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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

MYRON F. HEILIG,

Petitioner,

v.

HONORABLE CARL J. CHRISTENSEN, Chief Judge, Eighth Judicial District Court of the State of Nevada, In and for the County of Clark; ROBERT WEISS; and JACK SHULMAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

The petitioner, Myron F. Heilig, respectfully prays that a writ of certiorari issue to review the judgments and order of the Supreme Court of the State of Nevada entered on February 26, 1975, and June 18, 1975.

OPINIONS BELOW

The opinion of the Supreme Court of Nevada is not reported; however, it is attached hereto as Appendix A.

No opinion was rendered by the Supreme Court of the State of Nevada in the course of denying the petitioner's Petition For Rehearing. The Court issued an order denying the rehearing on June 18, 1975 (Appendix B), and issued a "Notice in Lieu of Remittitur" on July 9, 1975 (Appendix C). No opinion was issued by the Eighth Judicial District Court of the State of Nevada; however, the bench order of that court is attached (Appendix D) and the written order is attached (Appendix E).

JURISDICTION

The judgment of the Supreme Court of the State of Nevada was entered on February 26, 1975. A timely petition for rehearing was denied on June 18, 1975. On September 5, 1975, petitioner filed with this Court a Motion for Extension of Time in which to File Petition for Writ of Certiorari (No. A-209). Said motion was granted by Justice Douglas on September 16, 1975, extending the time to and including November 15, 1975, and this petition for certiorari was filed within the extended time period. This Court's jurisdiction is invoked under 28 U.S.C. §1257.

QUESTIONS PRESENTED

1. Whether an action in mandamus is the proper remedy to correct a lower court's written order and judgment which is at material variance from the court's earlier issued bench order to properly reflect the awards of the arbitrator.

2. Whether an action in mandamus is the proper remedy to correct a lower court's written findings, order and judgment which are at material variance from and directly contradictory to another written order from a different judge of the same lower court.

3. Whether the refusal by the Supreme Court of the State of Nevada to grant a writ of mandamus when there was no alternative remedy constituted a deprivation of due process of law under the Fourteenth Amendment to the Constitution.

4. Whether the action of the State District Court, in particular, its refusal to amend or modify its written order to conform to the arbitrator's awards and the prior issued bench order after the petitioner had acted in good faith and in reliance upon the arbitrator's awards and the bench order, deprived petitioner of due process of law under the Fourteenth Amendment to the United States' Constitution.

5. When the record of a proceeding reflects that an arbitrator has exceeded his authority and a judicial review of that act of the arbitrator fails to correct same, does mandamus lie to correct the error?

STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part, "No person shall be... deprived of life, liberty, or property, without due process of law . . .".

The Fourteenth Amendment to the Constitution of the United States, Section 1, provides in pertinent part:

> ". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws".

Nevada Revised Statutes, Chapter 34, Section 34.170, pertaining to writs of mandamus, provides in pertinent part:

"This writ shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It shall be issued upon affidavit, on the application of the party beneficially interested."

Nevada Revised Statutes, Chapter 38, outlines the procedures of arbitration. Section 38.145 provides in relevant part the following:

"1. Upon application of a party, the court shall vacate an award where:

(a) the award was procured by corruption, fraud or other undue means;

(b) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct substantially prejudicing the rights of any party;

(c) The arbitrators exceeded their powers;

(d) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of NRS 38.075, as to prejudice substantially the rights of a party; or

* * *

4. If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award."

Nevada Revised Statutes, Chapter 38, Section 38.155, provides the following:

"1. Upon application made within 90 days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where:

(a) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

(b) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

(c) The award is imperfect in a matter of form, not affecting the merits of the controversy.

2. If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the court shall confirm the award as made.

3. An application to modify or correct an award may be joined in the alternative with an application to vacate the award."

Nevada Rules of Appellate Procedure, Rule 4a, provides in pertinent part:

"(a) *Appeals in Civil Cases.* In a civil case in which an appeal is permitted by law from a district court to the Supreme Court the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within thirty (30) days of the date of service of written notice of the entry of the judgment or order appealed from."

Nevada Rules of Appellate Procedure, Rule 26 (b), provides as follows:

"(b) *Enlargement of Time.* The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; *but the court may not enlarge the time for filing a notice of appeal.*" (Emphasis added.)

Supreme Court Rules of Nevada Rule 200, provides:

"Rule 200. *Discovery of Imposition or Deception.* When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court, a party or other counsel, he should promptly endeavor to rectify it."

STATEMENT

In 1966, petitioner Heilig and respondents Weiss and Shulman entered into a joint venture partnership agreement for the purchase and operation of a large apartment complex located in Las Vegas, Nevada. On December 21, 1971, respondent Weiss filed a complaint in the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, which demanded judgment against petitioner Heilig and respondent Shulman for monies expended by Weiss for the benefit of the partnership. Pursuant to the partnership agreement, petitioner Heilig requested arbitration, which was ordered by the respondent Court. Thereafter, on December 28, 1972, an arbitration award was entered. The award provided that Heilig and Shulman each pay to Weiss the sum of $50,743.28 for loans made by Weiss to the partnership. Such payment was to be made prior to or simultaneous with the

passing of title from the partnership to Heilig, Weiss and Shulman of the respective shares of the partnership realty (owned in common). The award provided that a "closing" would occur within 45 days to execute the appropriate legal documents and for the submission of a "final accounting" by Weiss.

On February 6, 1973, petitioner Heilig filed a notice of the above award with the respondent Court, including copy of same. On February 15, 1973, respondent Weiss filed a document styled "Notice of Entry of Award of Arbitrator and Disposition of Request for Modification of Award".

On February 22, 1973, after jurisdiction had vested in the respondent Court, a hearing in the form of a "closing" was held in Las Vegas, Nevada, at which time an "accounting" was rendered by Weiss, stating that he was entitled to reimbursement in a sum in excess of $150,000 by Heilig and Shulman. The arbitrator approved deeds to Weiss and Shulman of their respective parcels awarded to them on December 28, 1972; however, with respect to the 38 parcels awarded to Heilig, the arbitrator refused to order such parcels be conveyed to Heilig. Rather, the arbitration award remains silent with respect to those properties belonging to Heilig. Heilig did not attend the hearing-"closing" for two principal reasons: First, no notice of hearing as required by the Rules of the American Arbitration Association had ever been served upon him.[1] Secondly, the partnership had entered into a lease of the real

[1] In connection with lack of notice, this Court's attention is invited to the letter of the American Arbitration Association dated September 6, 1973 (Appendix H), which lists the hearings noticed in this matter and omits the February 22, 1973, hearing-"closing."

properties with the Kogelschatz Korp., a California corporation. Under the terms of a partnership stipulation made during the course of the arbitration, the parties contracted that there would be no closing until such time as the Kogelschatz lease was judicially canceled by the courts of Nevada, a condition which still remains unsatisfied. The February 22, 1973, activity by the arbitrator was in violation of his authority under the American Arbitration Association Rules and Section 38.145 of the Nevada Revised Statutes.

The trial court, in its written decision of January 28, 1974, found that petitioner "Heilig deliberately chose not to attend or in any manner participate in the closing on February 22, 1973" (Finding Number 11), and for that reason, modified its bench order so that reciprocal deeds were not executed for the benefit of petitioner Heilig. In November of 1974, while the mandamus matter was still pending before the Nevada Supreme Court, Heilig's then attorney, Eric Zubel, discovered that a hearing to confirm the awards had been held before another judge of that same Eighth District Court, the Honorable Thomas J. O'Donnell, and on February 22, 1973, the same day of the hearing-"closing" conducted by the arbitrator, in the presence of counsel representing all of the parties, Judge O'Donnell refused to confirm the awards and ordered that Heilig be given until March 9, 1973, to file his objections to the awards. Substantial objections were filed in a timely manner (Appendix G). Throughout the proceedings held before Judge Christensen on November 28 and 29, 1973, Heilig was repeatedly castigated by Weiss' counsel for his failure

without reason to attend the hearing-"closing". Yet, no counsel ever disclosed the O'Donnell order to Judge Christensen, in violation of Rule 200 of the Supreme Court Rules of Nevada, which requires that if counsel discovers some fraud or deception has been practiced before the court, such fraud or deception should be rectified.

The arbitrator, under date of May 7, 1973, issued what he termed a final award and closing statement, which was not filed with the respondent Court until August 14, 1973.

On March 9, 1973, Heilig filed a reply and counterclaim to Weiss' motion to confirm the award as modified. On October 1, 1973, Heilig filed a motion to vacate the final award and closing statement based upon the arbitrator's improper and illegal acts.

Court hearings were held on October 4, November 28, and November 29, 1973. The respondent Court issued a bench order (Appendix D) which confirmed the arbitration award, and which secured the property rights of Heilig. Immediately thereafter and relying upon the bench order, petitioner sought to raise the necessary capital to satisfy his money judgments (see Appendix F).

The bench order confirming the awards was reduced to writing on January 28, 1974 (Appendix E); however, the written order differed materially from the bench order in that no provision was made whereby petitioner Heilig could obtain his one-third interest in the partnership property upon satisfaction of the money judgments against him. Further, Heilig's counterclaim for an accounting was dismissed, which effectively destroyed any basis to

question the validity and accuracy of the money judgments ordered against him. It is to be noted that the Court ordered respondent Weiss' counsel to prepare the written order consistent with the bench order and to consult with petitioner Heilig's counsel after the drafting of language of certain provisions in the written order. This instruction to Weiss' counsel was never followed.

Shortly thereafter, petitioner Heilig filed a motion to amend the lower court's findings and the judgment so that the written judgment would be consistent with the bench order. On February 11, 1974, the court denied Heilig's motion for order approving security and denied his motion for amendment of findings and judgment.

Heilig, along with tender of $100,000 as security for the judgment, filed a motion for rehearing which was denied on March 18, 1974.

On March 28, 1974, petitioner Heilig filed before the Supreme Court of the State of Nevada an application for issuance of alternative writ of mandate and writ of prohibition or in the alternative, for a writ of certiorari.

Petitioner contended that the respondent Court had wrongfully refused to exercise its jurisdiction by failing to conform its order and judgment entered on January 28, 1974, with the order given in open court on November 29, 1973, and to properly reflect the award of arbitration dated December 28, 1972. The petitioner further alleged that the respondent Court had wrongfully refused to exercise its jurisdiction pursuant to Chapter 38 of the Nevada Rules, the Nevada Revised Statutes, by failing to modify the award of the arbitrator as prayed for by petitioner in his motion before the respondent Court dated March 9, 1973, and by failing

to order an accounting from the respondent Weiss of the financial condition of the partnership property. After the petition was filed, the court reviewed same and ordered the respondents herein under written order to answer the petition. After several time extensions, the respondents replied to the petition and the court, after reviewing all data submitted, in July, 1974, ordered that the parties brief their respective positions and set the matter down for oral argument. In addition, pursuant to petitioner's request, and although respondents twice sought the imposition of a bond, the Supreme Court granted stay without bond. Subsequently, on February 12, 1975, the Supreme Court of the State of Nevada heard oral argument and denied petitioner's petition on February 26, 1975 (Appendix B), and the basis for the denial by the Supreme Court of the State of Nevada was that the petitioner Heilig has an ordinary remedy, *viz* an appeal before the Supreme Court of the State of Nevada.

It is to be noted that the respondent Weiss filed the Notice of Entry of Judgment on January 9, 1975. This was filed although a Stay Order from the Supreme Court of the State of Nevada was in effect and although oral argument was scheduled for February 12, 1975. After the denial of the petition by the Supreme Court in March of 1975, petitioner Heilig sought a rehearing on the Application for Writ of Mandate.

The petition for rehearing alleged *inter alia* that under Nevada Rule of Appellate Procedure 4(a) an appeal must be taken within 30 days of the date of service of the notice of entry of judgment; that the 30 days expired during the pendency of the application for issuance of alternative writ of mandate and writ of

prohibition or in the alternative, for a writ of certiorari and thus, the petitioner could not avail himself of the usual appellate route. The application for writ of mandate should have been granted. Its denial effectively prevented any further adjudication of your petitioner's claim.

On March 7, 1975, two orders which divested Heilig of his property were entered by the district court. The court's divestiture occurred prior to the case being remanded by the State Supreme Court. In order to protect his rights in the property, the petitioner Heilig had no plain, speedy or adequate remedy and, therefore, the petition for rehearing should have been granted.

On June 18, 1975, Heilig's petition for rehearing was denied by the Supreme Court of the State of Nevada, and on July 9, 1975, the Supreme Court of the State of Nevada issued a Notice in Lieu of Remittitur and denied petitioner's motion to stay issuance (of Notice in Lieu of Remittitur) pending his filing a petition for a writ of certiorari in the Supreme Court of the United States.

REASONS FOR GRANTING THE WRIT

I.

MISAPPLICATION OF THE LAW OF MANDAMUS BY NEVADA STATE COURTS HAS RESULTED IN THE LOSS OF PETITIONER'S PROPERTY IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

May state appellate courts be permitted to perpetuate injustice performed in a lower court when mandamus is

an effective and appropriate remedy? Are appellate courts free to refuse mandamus when there is no other form of relief and the refusal unconscionably deprives petitioner of a lifetime's worth of assets?

Petitioner believes that the Supreme Court of the State of Nevada has misconceived the need for the writ of mandamus and has abused its discretion by not granting same. By refusing to mandate the lower court to conform its written order to reflect that disposition made in open court orally, and in the arbitrator's awards,[2] at a time when the evidence and argument were fresh in the mind of the court rather than two months later, and when petitioner Heilig had in good faith and diligently sought a purchaser for his property in reliance upon the bench order, the State Supreme Court perpetuated the injustice of the lower court. This is particularly true in view of the fact that the time for appeal had lapsed, consequently *no other remedy* was available to petitioner. Notwithstanding these considerations, the Supreme Court twice refused to issue mandamus.

Mandamus is a proper action to compel the correction or amendment of a judgment where the duty

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[2] Wherever herein the language "awards of the arbitrator" appears, reference is being made to the award dated December 28, 1972, as modified by the award dated February 8, 1973. The third award dated May 7, 1973, and styled "final award and closing statement" was a legal nullity and completely beyond the scope of authority in the arbitrator.

of the court to make such correction is plain. See generally 55 C.J.S. § 97b.[3]

In the case of *Goldman, Sachs & Co., et al. v. Edelstein*, 494 F.2d 76 (1974), the United States Court of Appeals for the Second Circuit (New York) held that mandamus will lie where used as an aid of appellate jurisdiction to compel the district court to exercise authority when it is its duty and to confine it to the lawful exercise of its lawful jurisdiction. 494 F.2d 76, 78. In this regard, the district court herein first failed to exercise the proper authority it was obligated to do by preparing a written order which conformed to the oral one and to the awards of the arbitrator. Secondly, after petitioner pointed out to the court the obvious errors, the court failed to lawfully exercise its jurisdictional authority and correct same.

In the case of *Schlagenhauf v. Holder*, 379 U.S. 104, 110, 85 S.Ct. 234 (1964), this Court held that a writ of

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[3]In this regard, it is to be noted that Judge Christensen refused to correct the January 28 order for either one of two reasons: (1) He was not empowered to do so (in which case there can be no refutation mandamus was the proper action), or (2) Out of discretion, he refused to make the correction. In the latter case, it should be noted that the Judge made his pronouncement in open court immediately following the hearing and while the evidence was fresh in his mind, and it was not until two months later that a written order was made, without the benefit of additional hearing. If the Judge arbitrarily changed his mind, mandamus would be appropriate to order further hearing or to amend judgment. This is particularly true since the changed order fully deprived petitioner of his property without hearing after he had acted diligently and in good faith, in reliance on the bench order, and since the written order wrongfully modified the awards.

mandamus is appropriately issued when there is usurpation of judicial power or there is a clear abuse of discretion. In the present matter, there was no question that the lower court usurped its judicial power by arbitrarily, and without further hearing, changing its bench order which properly reflected the awards of the arbitrator to a written decision which did not so reflect the awards. This, of course, was a clear abuse of discretion. Accordingly, the State Supreme Court should have issued a writ of mandamus ordering the lower court to modify its January 28 order.

While it was held that mandamus cannot be used to control a decision of the trial judge in the case of *Platt v. Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 84 C.St. 769 (1964), it should be remembered that in this instance, mandamus was sought, *inter alia*, to assure that the written order conform to the pronouncement in open court and to the arbitration awards. Courts should not be free after issuing correct oral orders in open court to issue, without further hearing and without legal authority, written judgments that are at material variance with an arbitrator's awards and with the prior bench order. This is particularly true when a party, to his detriment, changes his position in a good faith attempt to comply with the bench order. Citizens should be entitled to rely upon open court pronouncements and to act without prejudice to their rights in reliance upon them.

In the case of *Padovani v. Bruchhausen*, 293 F.2d 546 (2nd Cir. 1961), the court granted mandamus directing the lower court to vacate or modify a pre-trial order because of the anomalous and self-defeating character of the order. Thus, mandamus is proper when

the order is anomalous or self-defeating. In the instant case, the court openly pronounced one order which conformed to the arbitrator's awards (Appendix C), however, two months later, the written order was anomalous to the pronouncement and thoroughly defeated petitioner's claim for an accounting which was the basis of money judgments against petitioner[4] and deprived petitioner of his property (see written judgment, Appendix D).

Nevada Revised Statutes, Chapter 38 outlines the procedures of confirming arbitration awards. Under Section 38.155, the court may modify an award for miscalculation of figures, for an award upon a matter not submitted to the arbitrator, or where the award is imperfect in form. In the lower court, Judge Christensen made no finding that could support modification of the arbitrator's awards. Therefore, the material variances in the written order dated January 28, 1974, from the arbitration awards and the bench order were in violation of the Judge's authority and mandamus was appropriate.

Nevada statutory law provides for a writ of mandamus where there is not a plain, speedy and adequate remedy (Chapter 34 of Nevada Revised Statutes, NRS 34.170). Nevada State case law provides for mandamus in an instance such as petitioner's

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[4]Obviously, the court recognized basic due process entitled petitioner to an accounting when Judge Christensen granted same in open court. Thereafter, the Judge omitted it from his written order and granted money judgments against petitioner.

(*SWISCO v. District Court*, 79 Nev. 414, 385 P.2d 772 (1963)) *even if there were other available remedies* (*Dzach v. Marshall*, 80 Nev. 345, 393 P.2d 610 (1964)). Judge Chirstensen's January 28, 1974, findings of fact and order were in direct contradiction with the earlier order of Judge O'Donnell and, therefore, in error.[5] The petition for writ of mandamus should have been granted.

In the case of *Bowler v. Vannoy*, 67 Nev. 80, 215 P.2d 248 (1950), the Nevada Supreme Court held, *inter alia*, (1) that the remedy of mandamus is not necessarily foreclosed upon merely because some other proceeding will lie, (2) that before mandamus is barred, there must be a complete, specific, adequate and legal remedy which will afford relief, and (3) that if there is doubt whether such remedy is adequate, mandamus will lie. In view of the totality of the circumstances, *i.e.*, the immediate need for protection, the improper action of the district court judge, the procurement of a ready and able buyer when time was of the essence, the inability of petitioner to finance a protracted appeal, it cannot be refuted that mandamus was not only the proper remedy, but the only adequate one.

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[5]Not only did petitioner seek mandamus for reinstatement of the bench order, but because (1) Helig had found a ready and willing purchaser who would purchase petitioner's share of the property at a profit of approximately $1 million, thus giving him funds to pay the money judgment, but time was of the essence, (2) because of the imminent threat of divestiture of his property (which did occur) and (3) because of insufficient funds with which to appeal and to post bond unless Heilig was granted title to the properties awarded him.

II.

THERE HAS BEEN A FLAGRANT DENIAL OF DUE PROCESS OF LAW BY THE NEVADA STATE COURTS.

The basic test as to whether a party has been afforded procedural due process is a question of whether there has been fundamental fairness in light of the total circumstances. *Sigma Chi Fraternity v. Regents of University of Colorado*, 258 F.Supp. 515, 528 (D.C. Col. 1966). See also *Watson v. Patterson*, 358 F.2d 297 (10th Cir. 1966). One must look to the nature of the proceedings and the rights that are affected by those proceedings in order to determine whether there has been a due process violation. *Grabinger v. Conlisk*, 320 F.Supp. 1213 (D.C. Ill. 1970). If the conduct which has occurred is such as to shock the conscience and offend one's basic sense of justice, there has been deprivation of due process. *Buder v. Bell*, 306 F.2d 71 (C.A. Mich. 1962). The essence of due process is to protect a person from arbitrary action. *Garrett v. City of Troy*, 341 F.Supp. 633 (D.C. Mich. 1972).

On November 29, 1973, the state district court judge issued a bench order which did the following:

1. Granted respondent Shulman a judgment against Heilig in the sum of $1,841.31, with interest at 6 percent.

2. Granted respondent Weiss a judgment against Heilig in the amount of $96,259.26, with interest at the rate of 6 percent.

3. Required Heilig, Shulman and Weiss to execute and deliver forthwith deeds to the property, as set forth in the arbitration award, to Weiss and to Shulman.

4. Upon payment by Heilig, within 30 days, of the above money amounts, all parties were directed to execute and deliver deeds to the property awarded to Heilig under the arbitration award.

5. Within 15 days from the date upon which Heilig was to pay the judgment sums, Weiss was to furnish a true and accurate accounting of all cash received and expended, property received and expended, personal property removed, replaced, taken away from or added to the property from February 22, 1973, to November 29, 1973.

6. The matter would then be brought before the court for settling of the accounting to determine whether additional sums were to be paid.

7. In the event Heilig owed further sums to Weiss, then double the amount of such sums would be a lien against the property awarded to Heilig under the terms of the arbitration.

8. The court also instructed the respondent Weiss' attorney to show the lien provisions and the deed provisions to petitioner Heilig's counsel before the judgment was presented to the court.

However, prejudicial to petitioner, in direct contravention of the bench order, Weiss' counsel did not confer with Heilig's counsel. Further, there was no provision whereby Heilig could obtain title to the partnership property upon payment of the money judgments against him. Heilig was prejudiced also when his counterclaim for an accounting was dismissed from the judgment, which effectively destroyed any basis to question the accuracy of the money judgments ordered against him. As a consequence thereof, divestiture occurred, although Heilig had produced a ready, willing

and able purchaser who would purchase the property and with the proceeds therefrom, Heilig would be able to pay off the money judgments. In point of fact, Heilig, prior to divestiture but subsequent to the written order was able to raise and tender the necessary money but the judge rejected the proffer of same. This was tantamount to a taking of property without due process of law.

Heilig, unable to afford to fund an appeal, unable to post the necessary bond, having a purchaser (which Heilig obtained as a result of attempting to comply with the November 29 Bench Order) which demanded clear title quickly, and with the imminent threat of divestiture was forced to seek the most expeditious review possible. With this in mind, and in view of the fact that the judge reduced his bench order to a materially different written judgment which did not reflect the awards of the arbitrator, Heilig sought review by way of mandamus. However, the Supreme Court rejected mandamus, ordering that the then unavailable normal appellate route was proper. The mandamus denial by the Supreme Court was totally unexpected inasmuch as the State Supreme Court lulled petitioner Heilig into a false sense of security. This was done by a series of steps taken by the Court which either tacitly or expressly suggested mandamus relief for Heilig would be forthcoming. First, after the petition for writ of mandate was filed, the court could have rejected the petition on the grounds of inappropriateness. However, it did not. Secondly, after review of the petition, the court obviously found meritorious points raised and by written order, required the respondents to answer. Thirdly, because of the complexity of the issues, the

Court in July, 1974, ordered a briefing schedule and oral argument. Presumably, by this time, the Court, if it were to find mandamus an ineffective and inappropriate remedy, could have and should have rejected petitioner's petition. In fact, had the court done so, petitioner Heilig would undoubtedly have sought his normal appellate route. However, the court did not do so and thereby implied that mandamus was an appropriate remedy. Thereafter, although a Stay Order was in effect, the Supreme Court did nothing to quash the Notice of Entry of Judgment which was filed on January 9, 1975, nor did it grant the Writ of Mandate after oral argument on February 12, 1975. In the Petition for Rehearing, after petitioner Heilig pointed out that the 30 days had expired and there was no normal appellate remedy (and further that the Notice of Entry of Judgement had been filed while a Stay Order was in effect), the Supreme Court still rejected the Writ of Mandate, and it did not cure the time prohibition in that on the record it was clear that the 30 days in which to appeal had expired. Furthermore, Rule 26(b) of the Rules of Appellate Procedure of the State of Nevada proscribed the Supreme Court from enlarging the time in which to file a notice of appeal. Thus, the action of the State Supreme Court illegally deprived the petitioner of his right of appeal.[6] In doing so, it wrongfully permitted the trial court's erroneous findings and opinion predicated thereon, to stand and thereby deprived petitioner of property without due

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[6]The net effect of the Nevada Supreme Court's action was to treat the district court as a court of first and final resort and to thus, effectively, deny petitioner any appeal.

process of law (Appendix G attachment, order of Judge O'Donnell dated February 22, 1973).[7]

The simple facts remain that petitioner was given only 30 days in which to obtain a purchaser[8] and he diligently sought to find a purchaser.

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[7]The relevance of the Judge O'Donnell order dated February 22, 1973, the same day that the arbitrator's hearing–"closing" occurred, is that respondent Weiss' counsel attempted to have the awards confirmed before Judge O'Donnell. Judge O'Donnell, however, refused to confirm the awards and ordered that petitioner Heilig be given until March 9, 1973, to file his objection to the awards. By virture of taking such action, Judge O'Donnell, in effect, lifted any possible authority in the arbitrator to hold the hearing-"closing," invalidated the hearing-"closing" and thereby rendered the trial court's findings of fact and conclusions of law predicated thereon erroneous. In addition, neither Respondent Weiss, a member of the bar of New York, nor his Nevada attorney, Mr. Steve Morris, apprised Judge Christensen of the existence of the O'Donnell order. This was in violation of Rule 200 of the Supreme Court Rules of Nevada.

[8]During this period of time, a stay order was in effect, as was acknowledged by the Nevada Supreme Court in its February 26, 1975, Opinion (Appendix A). But even if the 30 day period were not stayed, the 30 days obviously commenced from the date of the written order for three reasons: First, reciprocal commitments were ordered from the bench to be performed by Weiss and Shulman, and it could never have been the intention of the trial judge to force Heilig to perform in a vaccum. The order had to be reduced to writing so that Weiss and Shulman could be compelled to convey to Heilig his portion of the partnership property and so that the accounting requirement could be enforced. Secondly, it would be impossible to appeal the court's decision since 30 days from November 29, 1973, would expire well in advance of the written order and, in point of fact, the question would be mooted on appeal. Conversely, 30 days from date of written judgment would allow both an appeal and a stay of the 30-day period to determine its validity. Thirdly, if in fact the judge intended for the 30 days to commence from November 29, 1973, and since the 30 days issue would be moot and thus non appealable, it is all the more reason why a writ of mandamus would have been appropriate.

Heilig, under compulsion of the bench order, executed a contract of sale for the 38 parcels awarded to him with Robert Lee, Ltd., a Canadian company, in order to meet the money judgments. On March 18, 1974, while a stay of the state district court was still in effect, attorneys representing Robert Lee, Ltd. attempted to tender to the court the sum of $100,000 to satisfy the money judgments against Heilig and on consideration that the written order be modified to conform to the bench order and to the awards of the arbitrator which vested title in the property to Heilig for that portion awarded to him. The court rejected same. As a result, Heilig has been deprived of his primary asset acquired over a lifetime of work. Because of an alleged $100,000 indebtedness, which was secured ten-fold because of his interest in the partnership property, and which was offered to be paid in cash to the trial court, Heilig was judicially deprived of approximately $1 million. The facts on their face spell gross deprivation of due process.

CONCLUSION

In conclusion, the net result of the district court's action, and the affirmance by the Supreme Court, is that petitioner Heilig has been wrongfully deprived of his 38 parcels of property awarded to him by the arbitrator, said parcels representing one-third of the partnership interest. These 38 parcels have been quit-claimed by respondent Weiss to himself and have either been lost or are so totally clouded and encumbered that the effect is tantamount to a taking of

property without due process. All parties were on notice of petitioner Heilig's limited financial resources yet the courts condoned respondent Weiss' wrongful behavior and refused to give petitoner Heilig any practical help. Heilig has been denied his rights under the uniform partnership law and the law of fiduciaries; in addition, he has wrongfully been deprived of his property without due process of law.[9] The Nevada Supreme Court abused its discretion by not granting the writ of mandamus when it not only was the most proper, and expeditious remedy, but when it was the only vehicle by which to determine valuable property rights, to correct the lower court error, and to prevent a gross injustice that shocks the conscience. Refusal to grant mandamus when no appeal was available allowed the trial court to take property without due process and without one of the most vital of all rights, the opportunity for a hearing:

> "Whatever else may be uncertain about the definition of the term 'due process of law', all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing." *Ocha v. Morales,* 230 U.S. 139, 161 (1913).

The basic principles involved in this matter relating to due process of law and the clarification of the law of

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[9] At the November, 1973, hearing before Judge Christensen, even under the compulsion of a subpoena *duces tecum,* respondent Weiss refused to produce the partnership books and records. At that same hearing, Weiss' lawyer continually castigated respondent Heilig for failing to attend the improper and illegal February 22, 1973, hearing-"closing" and failed, in violation of his attorney responsibility, to disclose to the court the order of Judge O'Donnell.

mandamus as a vehicle to protect an individual's right to due process is of concern to all citizens. The abuses suffered by Mr. Heilig today could be vested upon anyone tommorrow. It is contended that the malicious abuse of the judicial machinery as it exists here is of direct impact and concern to all citizens. If the Supreme Court refuses to intervene in this matter, not only will the petitioner have lost his only opportunity to remedy this miscarriage of justice, but the broader effect will be to propagate the erosion of property rights without due process of law. For out of malice and by intentional abuse of the judicial system, respondent Weiss in violation of his fiduciary obligations to Heilig has blocked petitioner Heilig from his property for the past 18 months and continues to do so. By granting this application and, ultimately, the relief being sought, this court will correct practical abuses of the legal system which are of public concern and will afford the petitioner the opportunity of reacquiring his property at a time when favorable market conditions exist for that property.

For the foregoing reasons, therefore, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM C. CRAMER
BENTON L. BECKER
ARTHUR R. AMDUR
Cramer, Haber and Becker
475 L'Enfant Plaza, S.W.
Suite 4100
Washington, D.C. 20024
(202) 554-1100

November 13, 1975

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEVADA

MYRON F. HEILIG,

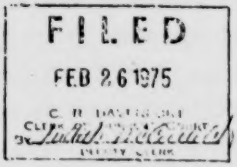
Petitioner,

vs.

HONORABLE CARL J. CHRISTENSEN, Chief Judge, Eighth Judicial District Court of the State of Nevada, in and for the County of Clark; ROBERT WEISS; and JACK SHULMAN,

Respondents.

No. 7665



Original proceedings in mandamus and prohibition or certiorari.

Denied.

Eric Zubel, of Las Vegas,
for Petitioner.

Lionel Sawyer Collins &
Wartman, Steve Morris,
Victor W. Priebe, and
Robert D. Faiss,
for Respondent Weiss.

Wiener, Goldwater & Galatz
and J. Charles Thompson,
for Respondent Shulman.

OPINION

Per Curiam:

Petitioner Myron F. Heilig seeks in these original proceedings the issuance of a writ of mandamus and a writ of prohibition or in the alternative a writ of certiorari to relieve him from complying with the order of the court below that confirmed an arbitrator's award dissolving and settling a certain partnership between Heilig and his partners, Respondents Weiss and Shulman.

1. In 1966, Heilig, Weiss, and Shulman entered into a partnership agreement for the purchase and operation of 113 apartment buildings in Las Vegas. They each signed, as part of the purchase contract, promissory notes secured by deeds of trust covering the property. In 1970, they leased the property to the Kogelschatz Korp. Kogelschatz later defaulted in their rental payments and abandoned the property. Weiss, with the approval of Heilig and Shulman, assumed the management of the apartments. He advanced substantial sums of his own money so that the partnership could remain solvent and continue in business. In December 1971, Weiss filed an action in the court below against Heilig and Shulman, seeking reimbursement for their pro rata shares of the moneys he had advanced to the partnership. Heilig asked the court to refer the matter to an arbitrator, as provided in the partnership agreement. The court did so. The partners submitted all issues in dispute to the arbitrator, including the dissolution of the partnership and the settling of its affairs. As the arbitration moved to a close, the three parties entered into a stipulation which provided for a final accounting and a division of the partnership property. The stipulation also provided that each of the partners would execute and deliver to the arbitrator a power of attorney which would enable the arbitrator to effect the settlement of the partners' affairs and divide the partnership property.

The arbitrator entered his award on December 28, 1972, which was modified pursuant to Weiss's request on February 8, 1973. The final award divided the partnership property and ordered Heilig and Shulman to reimburse Weiss for their pro rata shares of the moneys previously advanced by Weiss to the partnership. The award also set forth the formula for settling

the partners' accounts, and fixed February 22, 1973, as the time for terminating the partnership. Prior to February 22, 1973, Petitioner Heilig attempted to "revoke" his assent to the stipulation he had signed, giving the arbitrator the power to act in his behalf at the February 22 closing of the partnership, and he refused to attend the closing or participate in it in any manner.

Following the closing, the arbitrator prepared and sent to Heilig a statement of the accounting rendered in his absence at the closing. The arbitrator offered Heilig an opportunity to object to the accounting, if he chose to do so. Heilig failed to respond, and on May 7, 1973, the arbitrator prepared and delivered to the parties his Final Award and Closing Statement. The district court, after a full hearing on Weiss's motion to confirm the arbitrator's award, did so on January 28, 1974. Heilig then filed numerous motions contesting the lower court's Order Confirming Arbitrator's Award, as well as the judgment entered against him. The district court denied Heilig's motions, although the court stayed execution of the judgment to enable Heilig to pursue this petiton for extraordinary relief.

2. Petitioner Heilig has now applied to this court for "Issuance of an Alternative Writ of Mandate and Writ of Prohibition or in the Alternative, for a Writ of Certiorari." The thrust of Heilig's argument is that the order of the court below confirming the award does not reflect the award of the arbitrator or in any event the arbitrator's award does not resolve the issues to Heilig's satisfaction.

The order of a district court confirming the award of an arbitrator may be reviewed by this court upon direct appeal under

the express provisions of NRS 38.205, subsection 1(c).[1] Prior to 1969, certain orders of a district court concerning arbitration awards could be reviewed in this court by certiorari, although court orders affirming an award were appealable as final judgments. Plumbing Local 525 v. Eighth Judicial Dist. Court, 82 Nev. 103, 412 P.2d 352 (1966). In 1969, our Legislature adopted NRS 38.205, and since then an order confirming an award such as the one in the instant proceedings is reviewable only on direct appeal. Certiorari will not lie in the instant case.

Mandamus and prohibition are equally inappropriate remedies to review the award of an arbitrator. Neither can issue if the petitioner has a plain, speedy, and adequate remedy at law. NRS 34.170[2] and NRS 34.330.[3] Mandamus will not lie where another remedy is available. See State ex rel. Newitt v. Fourth Judicial Dist. Court, 61 Nev. 164, 121 P.2d 442 (1942). The principle upon which the law of prohibition is predicated is that its

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[1] NRS 38.205, subsection 1(c):

"1. An appeal may be taken from:

" . . .

"(c) An order confirming or denying confirmation of an award;

" . . ."

[2] NRS 34.170:

"This writ [mandamus] shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It shall be issued upon affidavit, on the application of the party beneficially interested."

[3] NRS 34.330:

"The writ [prohibition] may be issued only by the supreme court to an inferior tribunal, or to a corporation, board or person, in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It is issued upon affidavit, on the application of the person beneficially interested."

attack on jurisdiction is confined to those cases where no other remedy, such as direct appeal, exists. Bowler v. First Judicial Dist. Court, 68 Nev. 445, 454, 234 P.2d 593, 598 (1951).

It is clear, therefore, that mandamus, prohibition, and certiorari are inappropriate remedies to review the order of the district court which confirmed the award of the arbitrator in the instant case. Heilig's petition is denied, and this court's order of March 28, 1974, staying proceedings in the district court, is vacated.

Gunderson, C.J.
Gunderson

Batjer, J.
Batjer

Zenoff, J.
Zenoff

Mowbray, J.
Mowbray

Thompson, J.
Thompson

Attest: A full, true and Correct Copy.
C. R. Taylor, Clerk of the Supreme Court
By Judith McGuire, Deputy.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF NEVADA

MYRON F. HEILIG,

Petitioner,

-vs-

HONORABLE CARL J. CHRISTENSEN, Chief Judge, Eighth Judicial District Court of the State of Nevada, In and For the County of Clark, ROBERT WEISS, and JACK SHULMAN,

Respondents.

No. 7665

FILED

OCT 18 1975

ORDER DENYING PETITION FOR REHEARING

Rehearing denied.

It is so ORDERED.

Gunderson, C.J.

Batjer, J.

Zenoff, J.

Mowbray, J.

Thompson, J.

cc: Counsel of Record

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF NEVADA

MYRON F. HEILIG,)

Petitioner,)

vs.) No. 7665

HONORABLE CARL J. CHRISTENSEN, Chief Judge, Eighth Judicial District Court of the State of Nevada, In and For the County of Clark; ROBERT WEISS; and JACK SHULMAN,)

Respondents.)

NOTICE IN LIEU OF REMITTITUR

TO THE ABOVE-NAMED PARTIES:

The decision and opinion of the court in this matter having been rendered on February 26, 1975, and the petition for rehearing having been denied,

Notice Is Hereby Given that the opinion and decision rendered herein has, pursuant to Rule 40(a) of the rules of this court, become effective.

Dated this 9th day of July, 1975.

C. R. Davenport, Clerk

By: Faith McCulloch
Deputy Clerk

cc:
Daniel R. Walsh, Esq.
Messrs. Lionel Sawyer Collins & Wartman
Messrs. Wiener, Goldwater & Galatz

APPENDIX D

* * *

THE COURT: The award of the arbitrator is confirmed, save and except as it is not consistent with the [illegible] the judgment and order in this case that I am about to give.

Mr. Shulman is granted judgment against Mr. [illegible] for the sum of $1,041.31, together with interest at six per[illegible] from February 22, 1973; Mr. Weiss is granted judgment against Mr. Heilig for the sum of $98,259.26 together with interest at six percent from February 22, 1973.

Mr. Heilig, Mr. Shulman and Mr. Weiss are directed to execute and deliver forthwith, deeds to the property as set forth in the Arbitration Award to Mr. Weiss and to Jack Shulman. Upon payment by Mr. Heilig, within 30 days, of the sum due and owing, as heretofore stated in this order, then all parties are directed to execute and deliver a deed of the parties, as set forth in the Arbitration Award to Mr. Myron F. Heilig.

Also, within 15 days from the date upon which Mr. Heilig has paid the sums made a part of this judgment, Mr. Weiss will furnish a true and accurate accounting of all cash received and expended; property received and expended; personal property removed, replaced, taken away from or added to the property from February 22, 1973, down to this date.

When this is done, this matter will be again noticed before this Court for a settling of the accounting to determine whether sums shall be paid by Weiss to Heilig or Hielig to Weiss. In the event that it calls for payment of further sums by Mr. Heilig to Mr. Weiss, then double the amount of such sum shall be a lien against the property awarded to Mr. Heilig under the terms of this arbitration.

Now, I don't know whether I have stated it [illegible] like you gentlemen would like to hear --

MR. LEE: May I hear the last part again?

THE COURT: When Heilig gets that property, he is not to do anything with it and the amount of money on the accounting will be a lien as security for the amount of money determined on the account.

MR. LEE: Well, does go both ways? If it does against Mr. Heilig, does it go the other way against Mr. Weiss?

THE COURT: No, that is the order.

MR. LEE: What if Mr. Weiss owes him money?

THE COURT: Well good luck to you.

MR. LEE: Well, I don't mean -- I am not trying to be facetious.

THE COURT: Well, all I am trying to do is to wind this up and I think this will do it.

MR. LEE: Why can't we leave everything status quo until the final determination and then come back into Court and have the Court determine that.

THE COURT: Because within 30 days, if the money is not paid, there is no more status quo.

MR. LEE: You are saying 15 days after the payment of money then there will be an accounting.

THE COURT: That is correct.

MR. LEE: Then there will be an adjustment of money owed back and forth between the parties. Now, are you saying that at that point there is a lien for money owed from Mr. Heilig to Weiss which is double the amount?

THE COURT: That is correct, I am not going to have them give the property to Mr. Heilig and have him sell it or dispose of it during that period of time.

MR. LEE: If we show good faith, your Honor, they should also show good faith and it should work the other way. Let's have everybody's property remain before the Court.

THE COURT: No, because it all depends upon him paying the money. The answer is no.

Do you have what you need to dray the proper order, Mr. Morris?

MR. MORRIS: I do, your Honor.

THE COURT: The lien provisions and the deed provisions, I want you to show to Mr. Lee before you present it to me.

MR. MORRIS: What provisions?

THE COURT: The provisions regarding the deed. When Mr. Neilig pays the $1000,000.00 he is entitled to a deed and I want you to review that with Mr. Lee when you prepare the draft. Do you see what I am talking about?

MR. MORRIS: I understand, your Honor.

THE COURT: Then if you cannot get together on the language, come in and we will do it.

The Court is in recess.

ATTEST: FULL, TRUE AND ACCURATE TRANSCRIPT OF PROCEEDINGS HAD.

OFFICIAL COURT REPORTER

APPENDIX E

FILED
Jan 23 11 27 34 '74
LORETTA BOWMAN
CLERK
BY PAULETTE TAYLOR

CASE NO. A 9o771

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

ROBERT WEISS,

Plaintiff,

vs.

MYRON F. HEILIG and JACK SHULMAN,

Defendants.

ORDER CONFIRMING ARBITRATOR'S AWARD

The motion of Robert Weiss to confirm Arbitrator's Award, as Modified, having come on before the court for a hearing on October 3 and 4, and November 28 and 29, 1973, Mr. Weiss having withdrawn, with the approval of the Court and other parties, that portion of his Supplemental Motion and Points and Authorities to Confirm Award of Arbitrator, as Modified, and Certain Partnership Transactions, filed on August 14, 1973, dealing with the conveyance of certain partnership property, and the Court having reviewed the documentary evidence submitted by the parties, and having heard the oral testimony offered in behalf of each, and having read and considered the trial briefs and the various points and authorities filed by the parties from time to time in this case, including defendant Myron F. Heilig's Reply and Counterclaim filed on March 9, 1973, and heard and considered their arguments, and good cause appearing, the Court finds as follows:

1. That on February 9, 1967, Robert Weiss (Weiss), Myron F. Heilig (Heilig), and Jack Shulman (Shulman), entered

into a partnership agreement to conduct a business known as Churchill East Apartments.

2. That the partnership's assets consisted of 113 parcels of real property in Clark County, Nevada, with buildings thereon, which comprise 584 apartment units, together with furniture, appliances, and other personal property used in connection with the operation of the partnership's business.

3. That this action was commenced by Weiss on December 21, 1971, against Heilig and Shulman (erroneously listed as "Schulman" in the Complaint) and that it was thereafter stayed pending arbitration of the dispute between the parties upon the Application for a Stay Order, filed by Heilig on January 24, 1972.

4. That following the entry of the Stay Order by this Court, the parties undertook arbitration of all disputes between them in New York City, and such arbitration proceedings were attended by the parties and/or their attorneys and conducted in accordance with the Rules of the American Arbitration Association.

5. That on December 28, 1972, Philip Adelman, the arbitrator chosen by the parties, entered the award of Arbitrator, which is in evidence in this case as Plaintiff's Exhibit 7.

6. That thereafter the Award was modified by the arbitrator, in accordance with the applicable provisions of the Uniform Arbitration Act, by a Disposition of Request for Modification of Award, dated February 8, 1973, which is in evidence as Plaintiff's Exhibit 9. (The Award together with the Disposition will be hereinafter referred to as "the Award.")

7. That notice of entry of the Award was duly and regularly given to Shulman and Heilig by Weiss on February 15, 1972.

8. That the parties intended by the arbitration, and the Award so directed, that the partnership property which was

the subject of arbitration would be divided between the partners after each had settled his account with the other, at a "closing" at the partnership offices in Clark County, Nevada, on February 22, 1973, in accordance with the agreement of the parties.

9. That notice of the closing was duly given by the American Arbitration Association to each of the parties, and all but Heilig appeared at the appointed time and place to settle their accounts and execute the documents necessary to divide the partnership property.

10. That settlement and payment of each partner's account with the others was a condition precedent to him receiving a deed from the others to a portion of the partnership property, as called for in the Award.

11. That Heilig deliberately chose not to attend or in any manner participate in the closing on February 22, 1973.

12. That the closing was properly conducted before the arbitrator, in Las Vegas, Nevada, in accordance with the Award, and Weiss and Shulman performed each term of the Award as such applied to them, including exchanging deeds and rendering complete and satisfactory accountings to each other with respect to all partnership affairs.

13. That at the closing Weiss and Shulman settled all differences between them, and Weiss thereafter validly acquired from Shulman all of his right, title, and interest in and to the property awarded to Shulman by the arbitrator and the partnership and its property, and they are not adverse parties before this Court.

14. That on March 7, 1973, the arbitrator sent Heilig, and he received, a statement of the accounting which took place in his absence at the closing and invited him to comment on it or request a hearing on any aspect of it with which he did not agree; a copy of the arbitrator's letter is in evidence as Plaintiff's

Exhibit 13. Heilig did not respond to the arbitrator's letter.

15. Thereafter, on May 7, 1973, the arbitrator prepared and sent to each of the parties his Final Award and Closing Statement which sets forth a summary of what occurred at the closing on February 22, 1973, and accurately indicates the accounts of the partners at that time; such Statement is in evidence as Plaintiff's Exhibit 14.

16. That Heilig has attempted to avoid the obligations imposed upon him by the Award and delay these proceedings to confirm the Award without cause therefor, and his objections to confirmation of the Award and the Final Award and Closing Statement and his Counterclaim are without merit and should be, and hereby are, dismissed.

17. That the Award is entitled to confirmation.

18. That Heilig is indebted, as of February 22, 1973, to Shulman in the amount of $1,841.31, and to Weiss in the amount of $96,259.26, together with interest on both debts at 6% per annum from February 22, 1973, until paid.

Therefore, it is hereby

ORDERED:

1. That the Award of the arbitrator be, and it hereby is, confirmed, and the Final Award and Closing Statement be, and it hereby is, approved.

2. That Shulman shall have judgment against Heilig in the amount of $1,841.31, together with interest at 6% per annum from February 22, 1973.

3. That Weiss shall have judgment against Heilig in the amount of $96.259.26, together with interest at 6% per annum from February 22, 1973.

4. That Heilig is to forthwith, and in no event later than 5 days from the entry of judgment herein, execute and deliver to Weiss and Shulman a deed to each, dated as of February 22, 1973, of his interest in the property described in

Exhibit A hereto. In the event Heilig does not execute and deliver the deeds specified herein, the court, upon application without further notice, will enter its judgment divesting Heilig of title to the property described in Exhibit A and vesting it in Weiss and Shulman.

DATED: January 28, 1974.

CARL J. CHRISTENSEN
District Judge

Submitted by:

LIONEL SAWYER COLLINS & WAITMAN

By: Steve Morris

Steve Morris
302 East Carson, Suite 800
Las Vegas, Nevada 89101
Attorneys for Plaintiff

PROPERTY TO BE CONVEYED BY DEED TO KEISS:

Lots One (1), Two (2), Three (3), Six (6), Fourteen (14), Fifteen (15), Sixteen (16) and Seventeen (17) in Block Two (2);

Lots Two (2), Three (3), Four (4) and Five (4) in Block Three (3) in FAIRWAY GARDENS UNIT NO. 1, as shown by map thereof on file in Book 7 of Plats, page 73, in the Office of the County Recorder of Clark County, Nevada.

Lots One (1), Two (2), Three (3), Four (4), Five (5), Six (6), Seven (7), Twenty-one (21), Twenty-four (24), Twenty-five (25) and Twenty-six (26) in Block One (1) of FAIRWAY GARDENS UNIT NO. 2 as shown by map thereof on file in Book 8 of Plats, page 13, in the Office of the County Recorder of Clark County, Nevada.

Lots Seventeen (17), Eighteen (18), Nineteen (19) in Block Three (3) of FAIRWAY GARDENS UNIT NO. 3, as shown by map thereof on file in Book 8 of Plats, page 25, in the Office of the County Recorder of Clark County, Nevada.

Lots Four (4), Five (5), Six (6), Seven (7), Eight (8), Nine (9), Ten (10), Nineteen (19), Twenty (20), Twenty-one (21), Twenty-two (22) and Twenty-three (23) in Block Four (4) of FAIRWAY GARDENS UNIT NO. 3, as shown by map thereof on file in Book 8 of Plats, page 25, in the Office of the County Recorder of Clark County, Nevada.

EXHIBIT A

PROPERTY TO BE CONVEYED BY DEEDS TO PROPERTY:

Lots Seven (7), Eight (8), Nine (9), Ten (10), Eleven (11), Eighteen (18) and Nineteen (19) in Block Two (2);

Lots Six (6) and Seven (7) in Block Three (3) of FAIRWAY GARDENS UNIT NO. 1, as shown by map thereof on file in Book 7 of Plats, page 73, in the Office of the County Recorder of Clark County, Nevada.

Lots Nine (9), Ten (10), Eleven (11), Twelve (12), Thirteen (13) and Fourteen (14) in Block One (1) of FAIRWAY GARDENS UNIT NO. 2, as shown by map thereof on file in Book 8 of Plats, page 13 in the Office of the County Recorder of Clark County, Nevada.

Lots Thirteen (13), Fourteen (14), Fifteen (15) and Sixteen (16) in Block Three (3);

Lots Eleven (11), Twelve (12), Thirteen (13), Fourteen (14), Fifteen (15), Sixteen (16), Seventeen (17) and Eighteen (18) in Block Four (4) of FAIRWAY GARDENS UNIT NO. 3, as shown by map thereof on file in Book 8 of Plats, page 25, in the Office of the County Recorder of Clark County, Nevada.

Lots Nine (9), Ten (10), Eleven (11), Twelve (12), Thirteen (13), Seventeen (17) and Eighteen (18) in Block Five (5) of FAIRWAY GARDENS UNIT NO. 4, as shown by map thereof on file in Book 8 of Plats, page 51, in the Office of the County Recorder of Clark County, Nevada.

Lots Fourteen (14), Fifteen (15), Sixteen (16) in Block Five (5) of FAIRWAY GARDENS UNIT NO. 4, as shown by map thereof on file in Book 8 of Plats, page 51, in the Office of the County Recorder of Clark County, Nevada.

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

ROBERT WEISS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	J U D G M E N T
	)	
HYRON F. HEILIG and	)	
	)	
JACK SHULMAN,	)	
	)	
Defendants.	)	

The Court having this day signed and entered its Order Confirming Arbitrator's award in this action, which Order directed that judgment shall be entered in this matter in favor of Jack Shulman against Hyron F. Heilig, it is hereby

ORDERED, ADJUDGED and DECREED, that Jack Shulman be and he hereby is, granted judgment against Hyron F. Heilig in the amount of $1,841.31, together with interest at 6% per annum from February 22, 1973, until paid together with costs in the amount of $_____.

DATED: January 28, 1974.

CARL J. CHRISTENSEN
DISTRICT JUDGE

BY PAULETTE TAYLOR

Case No. A 96771

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

ROBERT WEISS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	J U D G M E N T
	)	
MYRON F. HEILIG and	)	
	)	
JACK SHULMAN,	)	
	)	
Defendants.	)	

The Court having this day signed and entered its Order Confirming Arbitrator's Award in this action, which Order directs that judgment shall be entered in this matter in favor of Robert Weiss against Myron F. Heilig, it is hereby

ORDERED, ADJUDGED and DECREED, that Robert Weiss be and he hereby is, granted judgment against Myron F. Heilig in the amount of $96,259.26, together with interest at 6% per annum from February 22, 1973, until paid together with costs in the amount of $_____.

DATED: January 28, 1974.

CARL J. CHRISTENSEN

DISTRICT JUDGE

APPENDIX F

MYRON F. H[illegible]D, being duly sworn, depo[illegible]s and says:

1. I am the petitioner in this case and make this affidavit in support of a petition for a rehearing.

2. At no time did I or any agent of mine ever represent to the arbitrator or the court that I would be able to pay any judgment assessed against me without the ability to borrow against or sell the 33 parcels of real property which were awarded to me in the awards dated December 28, 1972 and February 8, 1973. In fact I was unable to pay two interim awards totaling $5,000.00 and a strong argument was made to the arbitrator that my equity should therefore be reduced pro-rata but, in the award of December 28, 1972 the arbitrator refused to take any such action.

3. On November 29, 1973, Judge Christensen issued a bench order confirming the awards and allowing me thirty days to pay the money judgments assessed against me, upon the payment of which I would receive my 33 parcels. In obedience to this order, I arranged a conditional $1,5,000.00 credit line with Mr. Ken Koltner of Las Vegas in December of 1973 and, in January of 1974, I changed my position drastically by executing a contract of sale with Robert Lee, Ltd., a Canadian company, for the sum of 2.7 million dollars, a price which represented a profit of about one million dollars.

face the possibility of additional litigation if I am not put in a position to deliver those 3 parcels.

4. The money judgments levied against me as of February 22, 1973 in the amount of $[illegible]41.31 in favor of Jack Chaikan and $[illegible]9.21 in favor of Robert Weiss are numbers and totals derived exclusively from the hearing held by the arbitrator at the property on February 22, 1973, which I did not attend. Since that time about two and one half million dollars of partnership income has passed through the hands of Robert Weiss and I have been unable to obtain an accounting with respect to these monies. In my Application for Extraordinary Relief at page three I set forth five reasons why I did not attend this hearing, but an overwhelming sixth reason has been known to me only since November of 1974. It is the order of Judge O'Donnell sitting in another part of that same Eighth District Court which issued on the morning of February 22, 1973 in the presence of counsel representing all of the parties involved in this matter. That order required that I be given until March 9, 1973 to file my objections to the awards. Until that time I never knew that any judge except Judge Christensen had heard this case or had issued any order with respect to it. In the lengthly hearings held before Judge Christensen in October and November of 1973, neither my then attorney, John Peter Lee, nor attorney Steve Morris ever disclosed the existance of the order of Judge O'Donnell and in no way was it reflected in the record.

5. The awards gave me an undivided one-third interest in more than $400,000.00 worth of personalty. This consisted mainly of furniture, storage warehouses and their contents, automatic garbage bins, and all of the other equipment necessary to operate a property of this magnitude.

There has never been any division of this property to my substantial loss and detriment. Certainly this fact is another reason why a full and complete accounting should be ordered by the Supreme Court of Nevada.

Respectfully Submitted.

MYRON P. HEILIG.

SUBSCRIBED AND SWORN to before me
this 30th day of March, 1975.

NOTARY PUBLIC.

APPENDIX G

LAW CLERK

IN THE SUPREME COURT OF THE STATE OF NEVADA

MYRON F. HEILIG,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 7665
	)	
HONORABLE CARL J. CHRISTENSEN, Chief Judge, Eighth Judicial District Court of the State of Nevada, In and For the County of Clark; ROBERT WLISS; and JACK SHULMAN,	)	
	)	
Respondents.	)	

Application for Issuance of Alternative Writ of Mandate and Writ of Prohibition or in the Alternative, For a Writ of Certiorari

PETITIONER'S SUPPLEMENTAL BRIEF

ERIC ZUBEL, ESQ.
880 East Sahara Avenue
Las Vegas, Nevada 89105
Telephone: (702) 735-0456

Attorney for Petitioner

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IN THE SUPREME COURT OF THE STATE OF NEVADA

MYRON F. HEILIG, Petitioner,	)	
vs.	)	CASE NO. 7665
HONORABLE CARL J. CHRISTENSEN, Chief Judge, Eighth Judicial District Court of the State of Nevada, In and For the County of Clark; ROBERT WEISS; and JACK SHULMAN, Respondents.	)	

PETITIONER'S SUPPLEMENTAL BRIEF

I. FACTUAL BACKGROUND

Prior to November 15, 1974, Petitioner and his attorney were unaware of the fact that a regular hearing was held on February 22, 1973, in the matter of Weiss vs. Heilig et al, before the HONORABLE THOMAS J. O'DONNELL, District Judge of the Eighth Judicial District Court. The record of proceedings in the Court below heretofore available to Petitioner revealed no pleadings or Orders in connection with this hearing. It was only by the review of exhibits in this matter that Petitioner's attorney ascertained from the date stamp and clerk's signature that the parties were actually in Court on February 22, 1973. (See date stamp, Plaintiff's Exhibits 1, 2 and 3.)

Petitioner's attorney thereafter caused a search of the Court minutes of Department IV, to be made and discovered that an unreported hearing had been held on that date on WEISS' Motion to Confirm the Award of Arbitration. WEISS' attorney was able to have the matter set for hearing on February 22, 1973 by obtaining an Order Shortening Time from JUDGE COMPTON on February 15, 1973, on Ex Parte Motion.

(See pages 73 - 76, 84 of Index of Record on Appeal.) JUDGE COMPTON's Order provided that the matter be set for hearing before JUDGE CHRISTENSEN, on February 20; for some reason unreflected in the record, the hearing was held two (2) days later before JUDGE O'DONNELL.

On March 28, 1974, HEILIG filed his original Petition for Extraordinary Relief. In it he alleged that WEISS filed his Motion to Confirm the Arbitration Award as modified, on February 15, 1973. The Petition failed to allege, however, that a hearing was held on WEISS' Motion on February 22, 1973, the same day that the Arbitrator was holding his controversial "closing" in Las Vegas. Inasmuch as this fact was unknown to HEILIG or his attorney until November 15, 1974, this Court should permit HEILIG's Petition to be so amended.

II. ARGUMENT AND LAW

A. THE DISTRICT COURT WAS VESTED WITH EXCLUSIVE JURISDICTION BY FEBRUARY 22, 1973 TO DECIDE ALL QUESTIONS ARISING FROM THIS CONTROVERSY.

HEILIG has argued at length in his Brief that the Respondent Court had been vested with jurisdiction effective February 15, 1973, to confirm the Arbitration Award and that the so-called "closing", held by the Arbitrator on February 22, 1973, was void and of no legal effect. (See pages 33 - 37, Petitioner's Brief.) The fact that counsel for all parties were before the Court on that date, and that a hearing was held on WEISS' Motion to Confirm the Award as modified, would suggest that not only did the jurisdiction of the District Court preclude that of the Arbitrator, but WEISS, having himself invoked that jurisdiction is estopped to seek concurrent relief from the Arbitrator on the same day and then seek to penalize HEILIG with an unconscionable forfeiture for failing to attend the so-called "closing".

The Court minutes of that date* reflect the fact that a regular hearing was held, at WEISS' request; that WEISS moved the admission of Plaintiff's Exhibit 1, 2 and 3; that NATHAN ISQUITH, ESQ., was called as a witness by WEISS, cross-examined by HEILIG's then attorney, JOHN PETER LEE, ESQ., and re-examined by WEISS' attorney. In addition, there was opening argument by WEISS' attorney, a short adjornment and finally an Order from the Court allowing HEILIG until March 9, 1973, to file a response to WEISS' Petition. (See Court minutes appended hereto.)

B. THE POWER OF THE ARBITRATOR WAS "FUNCTUS OFFICIO" AS OF FEBRUARY 8, 1973.

On January 16, 1973 WEISS moved for modification of the December 28, 1972 Award. Defendants Exhibit "F". This Motion was based on Section 7509 of the New York Civil Practice Act, which is the statutory authority by which a party may request the Arbitrator to change his Award. The grounds for modification must fall within the purview of Section 7511; in other words, an Award may be modified under New York law by the Arbitrator prior to a Motion to Confirm on the same basis that a New York Court could modify it upon application of a party in post-confirmation proceedings. The respective provisions of the New York law are set forth in the Appendix.

Thereafter, on January 25, 1973, HEILIG filed a document with the American Arbitration Association in New York City, styled "Objections to Application to Modify Award". Defendant's Exhibit "G". In it, HEILIG asked the Arbitrator to stay his decision on WEISS' Motion and certify the issues raised therein to the Eighth Judicial District Court. On February 6, 1973, HEILIG noticed the December 28, 1972 Award with the Respondent Court, WEISS moved immediately thereafter

* See Appendix

to strike it as an "impertinent and scandalous document". Thereafter on February 8, 1973, the Arbitrator issued a Disposition of Request for Modification of Award pursuant to WEISS' request wherein he granted some of WEISS' requests and denied others. Plaintiff's Exhibit "9". WEISS then abandoned his Motion to Strike the December 28, 1972 Award and filed a Motion with the District Court on February 15, 1973, to confirm the Award as modified. The February 22, 1973 hearing before JUDGE O'DONNELL was on WEISS' Motion, and by that date the Arbitrator lacked any authority to perform any further activities in connection with the Arbitration proceedings.

Available case authority on this subject clearly holds that once an Award is made and later modified pursuant to Section 7509, the authority of the Arbitrator is ended and any further acts by him are of no legal effect.

In Dahlie vs. N-L-O Automotive Accessories, Inc., et al 337 N. Y. Supp. 2nd (1972), a New York Appellate Court was asked to review the validity of Affidavits received from the Arbitrators after the Award had been made. The Court noted:

> "The courts have repeatedly stated that an award is presumptively valid, final and binding on the parties, and "Once the arbitrators made their award they became functus officio". Matter of Eisenstein (Rednick), 8 A. D. 2d 794, 187 N. Y. S. 2d 409; Matter of Martin Weiner Co. (Freund Co.), 2 A. D. 2d 311, 155 N. Y. S. 2d 802, aff'd 3 N. Y. 2d 806, 166 N. Y. S. 2d 647, and Matter of Mole (Queens Ins. Co.), 14 A. D. 2d, 1, 217 N. Y. S. 2d 340. See, also, Eager (supra), § 124, p. 329. Unfortunately, Special Term herein indicated that affidavits from the arbitrators, although submitted after the award, were, notwithstanding, acceptable, as "the explanation of the arbitrator". In this case, we choose to regard these affidavits as surplusage and unnecessary for the corrective action taken by Special Term; they related only to form, did not seek to enlarge or impeach the award, did not represent an attempt by the arbitrators to perform further acts qua arbitrators, and properly viewed, were but a bona fide effort of the arbitrators to reaffirm the award as an aid to the court. However, this represents a practice not to be encouraged, if not

deplored, as the submission of such post factum affidavits by arbitrators can only serve to weaken and temporize with the finality of such awards."

It is submitted that the so-called "Final Award and Closing Statement" of May 7, 1973 in which the Arbitrator attempted to explain and amend the Modification of Award of February 8, 1973 is nothing more than a post-award Affidavit which seeks to temporize with and alter the Modified Award in a manner beneficial to WEISS and in derogation of the jurisdiction of the District Court. A comparison of the so-called "Final Award" (Plaintiff's Exhibit "14") and the Modified Award (Plaintiff's Exhibit "9") discloses that in the Final Award the Arbitrator sought to award WEISS and SHULMAN their respective parcels of the partnership property as well as the personalty in connection therewith to them " . . . free and clear of any claims by Mr. HEILIG." Page 4, line 6. The concluding portion of the Final Award then seeks to establish a pre-condition to HEILIG's receiving title to any of the property awarded to him. Though the language contained therein is no model of clarity, from the tenor of the so-called "Final Award" it appears that the Arbitrator intended in some fashion to penalize HEILIG for his failure to attend the so-called "closing" on February 22, 1973 by denying to him legal title to the partnership property previously awarded to him on December 28, 1972, later reaffirmed by modification on February 8, 1973. This denial appears to be based on HEILIG's failure to pay the monies alleged owing to the other partners at the February 22, 1973 "closing". This provision in the so-called "Final Award" is a direct contravention of the February 8th Modified Award which clearly awarded thirty eight (38) parcels [illegible] graph 1 (d).

In other words, the so-called "Final Award", in addition to being in derogation of jurisdiction of the District Court, is totally outside the scope of the power conferred on the Arbitrator by the law of New York. It constitutes nothing more than an Affidavit by him in which he seeks to temporize and alter the original Award as modified. For the above reasons, the so-called "Final Award and Closing Statement" was not entitled to confirmation by the Respondent Court.

Respectfully submitted,

ERIC ZUBEL, ESQ.
Attorney for Petitioner
880 East Sahara Avenue
Las Vegas, Nevada 89105

APPENDIX TO BRIEF

New York Civil Practice Act - Article 75 - Arbitration

Section 7509. Modification of award by arbitrator.

On written application of a party to the arbitrators within twenty days after delivery of the award to the applicant, the arbitrators may modify the award upon the grounds stated in subdivision (c) of section 7511. Written notice of the application shall be given to other parties to the arbitration. Written objection to modification must be served on the arbitrators and other parties to the arbitration within ten days of receipt of the notice. The arbitrators shall dispose of any application made under this section in writing, signed and acknowledged by them, within thirty days after either written objection to modification has been served on them or the time for serving said objection has expired, whichever is earlier. The parties may in writing extend the time for such disposition either before or after its expiration.

Section 7511 (c). Grounds for modifying.

The court shall modify the award if:

1. There was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award; or

2. The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

3. The award is imperfect in a matter of form, not affecting the merits of the controversy.

STATE OF NEVADA }
COUNTY OF CLARE } ss:

OFFICE OF THE COUNTY CLERK
[illegible], Nevada
[illegible] 1973

A regular session of Department Four of the Eighth Judicial District Court of the State of Nevada in and for the County of Clark was held pursuant to adjournment. Present: HONORABLE THOMAS J. O'DONNELL, DISTRICT JUDGE; Warren Hunt, Court Reporter; and Marie Lotting, Deputy County Clerk. Court called to order by the Bailiff.

[illegible])
PLAINTIFF,)
)
) NO. A76771 C10115---276
P. [illegible], et al.,) 135
)
)

[illegible]

[illegible] Defendant's Motion to [illegible]

[illegible]

[illegible] that [illegible]

Upon stipulation of counsel and by the Court so ORDERED, the Plaintiff's Pre-trial Memorandum & Exhibits, Tuesday, February 13, 1973 from Mr. Hollis; & (6) Nevada Arbitration Rules); and & Objection to Petition to Prove Award may be admitted into evidence as Petitioner's Exhibits 1, 2, and 3.

[illegible] called as a witness herein, sworn, and testified on her direct examination by Mr. Harris. Cross examination by Mr. Lee. Redirect examination by Mr. Harris. Mr. Harris offered Petitioner's Proposed Exhibit 4 (copy of letter, January 29, 1973) to be admitted into evidence. Objection and argument by Mr. Lee. By the COURT CONCLUDED, the objection sustained.

Opening argument by Mr. Harris.

Discussion between Court and counsel.

At 11:37 a.m. Court recessed in this matter for a few minutes.

Court reconvened in this matter with all present as of the previous session this date.

The Court stated that the Defendants are allowed until March 9, 1973, to file a response to the petition at the close of business on that date.

ATTEST: LORETTA BOWMAN, COUNTY CLERK

BY: Marie Lotting
DEPUTY

APPROVED:

[illegible]
DISTRICT JUDGE

CERTIFIED COPY

The [illegible] is attached [illegible] original on file [illegible]

DATE: November 15, 1974

[illegible] and County of [illegible] and for the County [illegible]

By: Lois N. Douglas — Deputy

APPENDIX H

September 6, 1973

RE: 1310-0474-72
Robert C. Weiss
and
Myron F. Heilig

Mr. Myron F. Heilig
7 Park Avenue
New York, New York 10016

Dear Mr. Heilig:

As requested, enclosed please find the Stipulation for Compensation for the Arbitrator.

This will also serve to advise that six hearings have been held in the above-captioned matter on the following days:

Hearing #1 July 13, 1972 at the American Arbitration Association.

Hearing #2 July 14, 1972 at the American Arbitration Association.

Hearing #3 August 15, 1973 at the American Arbitration Association.

Hearing #4 August 16, 1972 at the American Arbitration Association.

Hearing #5 September 14, 1972 at the Offices of Churchill East Apartments, 4320 Koval Lane, Las Vegas, Nevada.

Hearing #6 November 9, 1972 at the American Arbitration Association.

Further Mr. Philip Adelman, the Arbitrator, has advised us of the following:

"I have spent in excess of two hundred hours in hearings and in reviewing over six hundred pages of testimony and over fifty exhibits. I have also travelled to Las Vegas, Nevada where the realty is located, and spent four days there. For all services rendered to date, I am requesting a fee of $3,500.00 to be paid by the parties."

Very truly yours,

Connie Ghikar
Tribunal Administrator

CG:bl
Encl.
cc: John Peter Lee, Esq.

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IN THE

Supreme Court of the United States

October Term, 1975
No. 75-714

MYRON F. HEILIG,

Petitioner,

vs.

HONORABLE CARL J. CHRISTENSEN, Chief Judge, Eighth Judicial District Court of the State of Nevada, in and for the County of Clark; ROBERT WEISS; and JACK SHULMAN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

The opinion of the Nevada Supreme Court is reported at 91 Nev. ....., Adv.Op. 38, 532 P.2d 267 (1975).

JURISDICTION.

The Court's jurisdiction has been invoked by petitioner Heilig under 28 U.S.C. 1257(3), apparently in the belief he has been denied due process of law by the Nevada Supreme Court's discretionary determination to not grant a writ of mandamus in his favor to overturn a state district court decision against him from which he did not appeal.

There is not a federal question involved here, even if Heilig is correct that the Nevada Supreme Court

"misapplied" the "law of mandamus" (which respondents do not concede). Petition for Certiorari at 12. There is an adequate state ground upon which the Nevada Supreme Court's decision can be supported. For these reasons respondents believe that this case does not invoke this Court's jurisdiction and, therefore, clearly does not warrant review.

QUESTIONS PRESENTED.

1. Whether a civil litigant who fails to exercise his right to appeal a judgment against him has been denied due process of law if an appellate court thereafter declines to vacate the judgment by a writ of mandamus.
2. Whether one who is dissatisfied with an arbitrator's award has been deprived of any federal right by due confirmation of the award pursuant to state law.

STATUTES INVOLVED.

1. Nevada Revised Statutes, Chapter 38, Section 205, in 2 Nevada Revised Statutes 1312 (1973).
2. Nevada Revised Statutes, Chapter 34, Sections 150-310, in 2 Nevada Revised Statutes 1177-80 (1973).

(Hereafter citations to Nevada statutes will be "NRS" followed by the appropriate subdivision.)

STATEMENT OF THE CASE.

This statement is based on the proceedings in the district court, not all of which have been reported. Most of what follows was stated in the Statement of Facts in Respondents Weiss and Shulman's Brief

filed in the Nevada Supreme Court, which was not commented on or objected to by Heilig. Respondents have not been favored with an index to the record before this Court so they are unable to cite where in the record the brief may be found.

The exhibits cited in this statement were, except where a citation to the record appears, admitted into evidence in unreported hearings on February 22 and September 20, 1973. All of the exhibits were either stipulated into evidence or received without objection. Because the exhibits are bound separately but are not a paginated portion of the record, citation of them will be "Exhibit ...." without further reference.

The partnership property involved in this case is an apartment complex comprised of 113 individual parcels of real property in Clark County, Nevada. Exhibit 18. The parties to this proceeding (other than Judge Christensen) entered into a partnership agreement which provided for the ownership and operation of the property as an apartment rental business. Exhibit E; R. 238. At the time of acquiring the property, each partner executed 113 promissory notes for the entire purchase price of the parcels; each of them is jointly and severally liable on the notes, which are secured by deeds of trust on file in the Clark County Recorder's office. R. 306.

In 1970 the partnership entered into a lease of the partnership property with Kogelschatz Korp. R. 251. The lease proved not only unprofitable but detrimental; the lessee did not pay the rental specified in the lease or the mortgage payments, did not keep the apartments occupied or properly maintained, and otherwise let the property deteriorate or be destroyed

by some of the tenants and vandals. R. 293-96, 305-09. The lease was not recorded and therefore was not a cloud on title, a fact which was accepted by the district court. R. 154, 181-87.

Default on the lease by Kogelschatz seriously impaired the partnership's capital and ability to pay installments on the indebtedness outstanding against the property. Weiss was appointed by Heilig and Shulman to go to Las Vegas and attempt to work out matters with Kogelschatz and preserve the lease. R. 70-71. If the lease could not be maintained, Weiss was directed to take all steps necessary to preserve the property. The lender which held the deeds of trust was threatening foreclosure unless the property was repaired and maintained in accordance with the provisions of the deeds governing such matters.

Weiss was unable to work out a solution with Kogelschatz and commenced suit against it to obtain possession of the property. R. 251; Exhibit R. Kogelschatz thereafter abandoned it, and to save the property from further destruction and the partnership from insolvency, and to avoid personal liability on the joint and several notes executed by the partners, Weiss, without prior consideration or arrangement, gave up his home and law practice in New York in July, 1971, remained in Clark County with his family, and took over the operation of the partnership business because both Heilig and Shulman had failed and refused to cooperate with him to work out an acceptable alternative or in any manner share the burden of operating the business with him. At the time Weiss took over the property it was losing $20,000 per month and continued to do so for some time thereafter.

After moving to Clark County, Weiss, with no other means of financing available, advanced substantial sums of his own and money borrowed by him personally to save the partnership from bankruptcy. (From July, 1971, to February 22, 1973, the property lost approximately $375,000.) He later filed the complaint in this case to obtain reimbursement for the money loaned by him to the partnership. The action was stayed at the request of Heilig, by order of the district court, pending arbitration of the dispute in New York City. R. 101-02. Heilig did not do anything after obtaining the stay to institute arbitration proceedings; that was accomplished by Weiss.

The arbitration hearings took place over a period of eight months, and they were conducted by the American Arbitration Association pursuant to its rules. R. 239. Weiss made four trips to New York City during 1972 to participate in the hearings. In furtherance of the arbitration, the arbitrator came to Clark County on two occasions to view the partnership property. All of the parties attended the arbitration either in person or through an attorney, except for the closing provided for in the arbitrator's award, which was not attended by either Heilig or his attorney, although they had proper notice of it. Both Heilig and Weiss are attorneys licensed to practice in New York. Shulman and Heilig were represented by an attorney at every hearing before the arbitrator. R. 182-83.

During the arbitration, pursuant to the agreement of the parties, and at the direction of the arbitrator, Weiss resided on and managed the partnership property with his wife. Weiss continued to advance the money necessary to continue the business. Exhibit 5. The only contribution made by Heilig to the partnership,

during this or any other time, was at the direction of two of the four interim awards entered by the arbitrator. R. 254; Exhibit 7, ¶¶1-4. The orders were entered to provide funds to operate the property and avoid foreclosure; Heilig stopped payment of his check for his share under the third order; he ignored the fourth. R. 254; Exhibit 4 (not admitted, but authenticity not questioned).

On August 16, 1972, during arbitration, the parties —including Heilig and his attorney—entered into a stipulation, which was read into the record by the arbitrator, regarding a number of partnership matters. Exhibit 5. Among other things, the stipulation provided for "a final accounting and settlement" and "division of the [partnership] property," and a "closing" to accomplish these matters after issuance of the arbitrator's award. Exhibit 5, ¶5. The award provided for the arbitrator to retain jurisdiction, pursuant to the agreement of the parties, for 30 days following the closing to settle any outstanding items. Exhibit 7, ¶12.

The stipulation also sets forth the parties' express agreement that each of them would "execute and deliver power of attorney" to the arbitrator "to make, execute and deliver deeds and other instruments that may be necessary to effectuate a division of [the partnership] property in accordance with his decision for the division of the property," which power of attorney was to be used by the arbitrator "in the event any of the parties are not available" at the closing. Exhibit 5, ¶10. (Just prior to the closing, Heilig attempted to repudiate this portion of the stipulation.)

The arbitration culminated in an award, dated December 28, 1972; Weiss thereafter moved for modifica-

tion of it in accordance with the applicable state law and the rules of the American Arbitration Association. After receiving Heilig's response to the request for modification, the arbitrator amended the award by a Disposition of Request for Modification of Award on February 8, 1973. R. 182; Exhibits 7 and 9, respectively. (Unless it is necessary to distinguish between the two, both will be referred to as "the award.") The award directed dissolution of the partnership, division of the partnership property, and, among other things, an award in favor of Weiss against each of the two other partners for their proportionate share of the loans made by him to the partnership. The award also scheduled the time and place for winding up and terminating the partnership's affairs and adjusting the accounts of the partners (the "closing" referred to in the stipulation, Exhibit 5, ¶5). The time was February 22, 1973, and the place was the office of the partnership in Clark County, Nevada. Exhibit 9, ¶F.

Following modification of the award, Weiss filed his Motion to Confirm Award of Arbitrator, as Modified, on February 15, 1973. R. 77-83. Several hearings were conducted on the motion in an attempt to obtain confirmation of the award prior to the closing. The judge assigned to the case, respondent Christensen, was not available, and the initial hearings on the motion were conducted by the Honorable Thomas J. O'Donnell. Heilig's then attorney, John Peter Lee, appeared in court in response to the motion to contest the validity of the proceedings, alleging that notice of the motion had not been properly served on Heilig, even though Heilig had written a letter to Weiss telling him "that all communications of whatever sort or de-

scription you may wish to send me including but not limited to service of process are to be directed to me in care of John Peter Lee, Esq. . . ." (Exhibit 1), which had been done.

The court overruled these objections on February 22, 1973, in the presence of Heilig's attorney and set a hearing on the motion at a later time. Heilig was given until March 9, 1973, to file objections to confirmation, which he did by a "Reply to Motion to Confirm and Counterclaim." All parties to the arbitration or their attorneys and the arbitrator were in court before Judge O'Donnell on the morning of February 22; all, including the judge, knew that the closing was scheduled for the afternoon of that day. No one even suggested a stay of the closing. Petition for Certiorari, Appendix G, at 32a; Petitioner's Supplemental Brief, Appendix at iii, filed in Nevada Supreme Court.

Heilig deliberately chose not to attend or participate in it in any manner. R. 183. As previously mentioned he attempted to "revoke" the arbitrator's authority to execute any document on his behalf which would be necessary to complete the closing in his absence. Exhibit B. The attempt to revoke was specifically rejected by the arbitrator. Exhibit 22. Both Shulman and Weiss, together with Shulman's attorney, Nathan T. Isquith, and the arbitrator, Philip Adelman, attended the closing, as called for in the award, as it applied to them, and exchanged deeds to portions of the partnership property. R. 183. Thereafter the arbitrator prepared and sent a copy of the accounting rendered at the closing to Heilig and invited him to object to any portion of it and offered him the opportunity of a hearing on his objections. R. 183; Exhibit 13. Heilig

did nothing in response to the arbitrator's invitation. R. 183-84. (The arbitrator's jurisdiction to so act was conferred by agreement of the parties, which was incorporated in the award. Exhibit 7, ¶12.)

On May 7, 1973, the arbitrator, not having received any response from Heilig about the accounting, rendered his Final Award and Closing Statement in which he set out the transactions which took place at the closing, and restated the intent and some of the dispositive provisions of his award. R. 184; Exhibit 14.

Following delivery of the Closing Statement to Heilig, extensive hearings were conducted in the district court on the motion to confirm the award. Such resulted in the Order Confirming Arbitrator's Award, entered by the court on January 28, 1974. R. 181-185. During the course of the district court hearings, Heilig took inconsistent positions; for example, that the arbitration was still pending, although he himself had filed a Notice of Award of Arbitrator (during the time the modification of it was pending) on February 6, 1973.

ARGUMENT.

Every issue raised in the Petition was raised in the Nevada Supreme Court and in the district court. Each one was decided against Heilig after a thorough hearing; none raises a federal question here, as will be demonstrated.

I

The Disputed Closing on February 22, 1973.

The closing, as pointed out above, p. 7, was agreed to by Heilig; its purpose was to implement the arbitrator's award. Because Heilig refused to participate in it, confirmation and enforcement of its terms by court order was necessary.

Specific performance of arbitration awards is available on the same terms and conditions as it is for other awards, Levy v. Superior Court, 15 Cal.2d 692, 104 P.2d 770 (1940), and a court of equity is especially disposed to decree specific performance of awards involving title to land. 5 Am. Jur. 2d *Arbitration & Awards* §158 (1962); 81 C.J.S. *Specific Performance* §73 (1953); *see also* the early case of Jones v. Boston Mill Corp., 21 Mass. (4 Pick) 507 (1827), cited in Annot., 70 A.L.R.2d at 1062 (1960). Furthermore, such enforcement of the award may be granted in the same action in which confirmation of the award is secured. Kerr v. Nelson, 7 Cal.2d 85, 59 P.2d 821 (1936). Weiss and Shulman were clearly entitled to have the arbitrator's award enforced, as well as confirmed, to place uncontested title to two-thirds of the partnership property in them.

There is no question that the parties to an arbitration may agree on further action to be taken by the arbitrator after delivery of the award and thereby enlarge

his powers. *See* Jannis v. Ellis, 149 Cal.App.2d 751, 308 P.2d 750 (1957). Similarly, it is settled that

> Ordinarily, an award, otherwise valid, can be in no way affected or abrogated by any act or attempted repudiation of one of the parties alone. . . .

6 C.J.S. *Arbitration* §106 (1975); *see also* Dugan v. Phillips, 77 Cal.App. 268, 246 P. 566 (1926); Keith Adams & Assocs., Inc. v. Edwards, 3 Wash.App. 623, 477 P.2d 36 (1970). Furthermore, if putting the award into effect is prevented by the refusal of one party to abide by its terms, that is sufficient to justify enforcement of the award by the court, regardless of whether the party seeking enforcement has performed his part of it or not. 6 C.J.S. *Arbitration* §130 (1975). A party simply may not prevent the rendition or carrying out of a binding award by his own deliberate default. Spring Cotton Mills v. Buster Boy Suit Co., 275 App.Div. 196, 88 N.Y.S.2d 295 (Sup.Ct. 1949), *aff'd* 300 N.Y. 586, 89 N.E. 2d 877 (1949). Even an innocent procedural default, which is not a statutory ground for vacating an award, does not entitle a party to relief by the court from the effect of such a default. Central Gen. Hosp. v. Local 1115 Nursing Home, 61 Misc.2d 447, 305 N.Y.S. 2d 948 (Sup. Ct. 1969); *see also* Campanelli v. Conservas Altamira, S.A., 86 Nev. 838, 477 P.2d 870 (1970).

Thus Heilig's attempted repudiation of the stipulation and his refusal to participate in the closing had no effect on the right of Weiss and Shulman to obtain confirmation and enforcement of the award by the district court. *See* Transnational Ins. Co. v. Simmons, 19 Ariz.App. 354, 507 P.2d 693 (1973).

It has also been held, at least in the absence of fraud, *cf.* Nelson v. Reinhart, 41 Nev. 69, 167 P. 690 (1917), that when a stipulation has been entered into and filed with a tribunal, one of the parties will not be allowed to withdraw from it without the consent of the others, except by leave of the tribunal upon a showing of good cause. Smith v. Owens, 397 P.2d 673 (Okla. 1963). Furthermore, the Nevada Supreme Court has held that a party cannot avoid the effect of a stipulation because such is adverse to him. Second Baptist Church v. Mount Zion Baptist Church, 86 Nev. 164, 466 P.2d 212 (1970); *see* Webster v. Webster, 216 Cal. 485, 14 P.2d 522 (1932); Goltl v. Cummings, 152 Colo. 57, 380 P.2d 566 (1963); and the lengthy discussion in Estate of Meister, 72 Misc.2d 459, 339 N.Y.S.2d 575 (Sur.Ct. 1972), in which it is emphasized that when there is not a dispute as to terms, a stipulation cannot be avoided because of "second thoughts occasioned by information available at the time of the agreement but not then considered significant." 339 N.Y.S.2d at 579.

Thus the arbitrator was correct in specifically rejecting Heilig's attempt to withdraw from the stipulation in this case and revoke the authority given to the arbitrator to execute deeds on Heilig's behalf. *See* Staklinsky v. Pyramid Electric Co., 6 N.Y.2d 159, 160 N.E.2d 78 (1959), in which the New York Court of Appeals upheld an arbitrator's grant of specific performance when it had been authorized by the parties, even though it was doubtful that a court could have given the relief under the same circumstances. Consequently, the district court in this case was correct in confirming the arbitrator's award and in specifically ordering Heilig to execute a power of attorney or

proper deeds to Shulman and Weiss dated as of February 22, 1973. Heilig refused to do either, and the court properly executed deeds for him. Nev. Rule Civ. Proc. 70, 2 NRS at 894.

II

The February 22, 1973, Hearing and the Alleged "Fraud" in Connection With It.

This "issue" hardly deserves comment; it is either the product of ignorance or a deliberate misrepresentation. Heilig alleges that either Weiss or his attorney should have told respondent Judge Christensen about the order of Judge O'Donnell on February 22, 1973, which set a date for Heilig to file objections to confirmation of the award. Apparently Heilig believes the order in question and its significance have been concealed by Weiss and his attorney. This is nonsense for two reasons: (1) the order has nothing to do with the closing, and (2) it was obtained by Heilig's attorney who was in court at the time it was announced. Petition for Certiorari at 8. It is elementary that notice to Heilig's attorney was notice to Heilig. Noah v. Metzker, 85 Nev. 57, 450 P.2d 141 (1969). There was therefore no failure to disclose anything unknown to Heilig. If he thought the February 22 order was significant, he should have brought it to the attention of Judge Christensen.

III

The Alleged Discrepancy Between the District Court's Oral Announcement and Its Written Order.

This was the subject of two motions in the district court; both were denied. Petition for Certiorari at 10. In this regard it should be pointed out that there is a misstatement of fact on page 10 of the Petition:

There was not a tender of any sum of money to the district court in connection with Heilig's attempt to amend the court's findings, nor was there a tender at any other time during the proceedings in either the district court or the Nevada Supreme Court.

Whatever variance there is between the district court's oral announcement and its written order is irrelevant. Under Nevada law it is the executed written order which prevails, even if it contradicts a preceding oral order. Fox v. Fox, 84 Nev. 368, 441 P.2d 678 (1968); Musso v. Triplett, 78 Nev. 355, 372 P.2d 687 (1962); Bowers v. Edwards, 79 Nev. 384, 385 P.2d 783 (1963). Moreover, the oral statement clearly exceeded the court's authority under the Uniform Arbitration Act, NRS Chapter 38, a fact which Judge Christensen presumably recognized and which explains the variance in his written order.

For these reasons the district court was not obligated to reform its written order of January 28, 1974, and the Nevada Supreme Court was not *required* to issue mandamus to compel such action by the lower court. This result is not altered by the cases cited by Heilig, for they are either inapposite on their facts or involve instances in which the Nevada Supreme Court, in the exercise of its discretion, found mandamus justified.

IV

The Extraordinary Writ Proceedings in the Nevada Supreme Court.

What Heilig is really concerned about is the fact that the district court's order confirming the arbitrator's award has become final; he let the time run for appealing it to the Nevada Supreme Court without filing a notice of appeal. NRS 38.205(1)(c) allows an appeal

to be taken from "an order confirming or denying confirmation of [an arbitrator's] award." Rather than appeal Heilig sought extraordinary relief by an original proceeding in the Nevada Supreme Court to obtain a writ of mandamus, prohibition, or certiorari. None of the writs was available to him because he had an adequate remedy at law at the time he applied for them. Heilig v. District Court, 91 Nev. ...., Adv.Op. 38, 532 P.2d 267 (1975); *see* State ex rel Newitt v. District Court, 61 Nev. 164, 121 P.2d 242 (1942). It is incontestable under Nevada law that mandamus is not proper even if a possible legal remedy is not "as 'plain, speedy, and adequate' a remedy as is provided by mandamus, and that an action for money damages 'would not be equally as convenient, complete, beneficial and effective' as a writ of mandamus." Washoe Co. v. Reno, 77 Nev. 152, 155, 360 P.2d 602, 603 (1961).

Thus the real issue in this case has been properly disposed of on an independent state ground, which is dispositive of Heilig's petition here, Farson v. Bird, 248 U.S. 268 (1919), and it must be dismissed. *Id.; see* Copperweld Steel Co. v. Industrial Comm'n, 324 U.S. 780 (1945). Heilig is entitled to nothing more than what he already has obtained—a hearing in the court of his choice in a proceeding, the form of which was selected by him, in an attempt to review the district court's order confirming the arbitrator's award. That he was unsuccessful in his attempt does not raise the denial of his petition by the Nevada Supreme Court to the level of a denial of due process which should be considered by this Court. Morgan v. Hines, 113 F.2d 849 (D.C.Cir. 1940); Simmons v. Superior Court, 52 Cal.2d 373, 341 P.2d 13 (1959).

Nor is there any merit in Heilig's claim that Weiss was not entitled to file the Notice of Entry of Judgment [*sic;* should read "Notice of Entry of Order Confirming Arbitrator's Award"], discussed at page 21 of the Petition for Certiorari, or that the Nevada Supreme Court "did nothing to quash it." Filing of the notice was not a "proceeding" which was "pending" in the district court and thus subject to the Court's stay—it was merely formal notice to Heilig and his counsel that the district court had entered its order confirming the award on January 28, 1974. All he needed to do was file a simple, one page Notice of Appeal within the next 30 days. Nev. Rules App. Proc. 3, 4, and Form 1 appended thereto; 2 NRS at 974-976, 1005; Jumbo Mining Co. v. District Court, 28 Nev. 253, 81 P. 153 (1905). It is therefore beyond cavil that the notice of entry of the order confirming the arbitrator's award was validly filed. If Heilig wished to contest it, he should have filed a notice of appeal and proceeded in the Nevada Supreme Court under NRS 38.205(1)(c).

The district court's judgments of March 5, 1975, divesting Heilig of title to 75 of the 113 parcels of real property which were awarded to Weiss and Shulman by the award are valid; Heilig, as pointed out above, refused to execute deeds pursuant to the award and the district court's order to do so. As indicated above, the court had the authority to act if he did not under Rule 70 of the Nevada Rules of Civil Procedure. 2 NRS at 894. Heilig was not deprived of anything to which he was entitled by these judgments, because Weiss and Shulman received only what they had been awarded more than two years earlier by the arbitrator, whose authority and

award Heilig has spent three years in an attempt to repudiate.

Heilig has had a full opportunity—if not multiple opportunities—to raise every issue discussed in his Petition for Certiorari before either or both the district court and the Nevada Supreme Court. He does not deserve further consideration by this Court because his claims have been resolved against him under state law which has accorded him all of the process to which he is due, if not more.

CONCLUSION.

Heilig's alleged "loss" of property is not a loss at all; he has not been deprived of any property awarded to him by either the arbitrator or the district court. All that has happened is that Weiss and Shulman have obtained title to two-thirds of the former partnership property in accordance with the intention and award of the arbitrator. With regard to the one-third which would have been distributed to Heilig if he had attended the closing and performed, its status and title were not affected or dealt with by either the district court or the Nevada Supreme Court. Such remains to be adjudicated. The fact that Heilig did not attend the closing to implement the award is legally meaningless insofar as Weiss and Shulman are concerned; they were there, they performed, and they are entitled to whatever the award conferred on them by virtue of their performance.

This case does not involve a denial of due process or a federal question of general interest, nor does it involve any issue the resolution of which would have any national significance. It will affect few, if

any, other than the litigants in this case; the decisions of the district court and the Nevada Supreme Court are based on a set of facts which is unlikely to occur with any frequency in the future, if at all. All Heilig is saying is that he is dissatisfied with the result of the arbitration he requested, and he failed to take a timely appeal from the district court's order confirming the arbitrator's award. His failure does not amount to a denial of due process by the Nevada Supreme Court. Avens v. Wright, 320 F.Supp. 677, 684 (W.D. Va. 1970). This would be true even if the Nevada Supreme Court erroneously denied Heilig's petition, because "the Constitution of the United States does not guarantee that the decision of state courts shall be free from error [citations omitted]." Worcester County Trust Co. v. Riley, 302 U.S. 292, 299 (1937).

Heilig's avoidance of the closing was a calculated decision to avoid two things: (1) payment of just debts to Weiss and Shulman, and (2) taking any property in his name for which he would then have to assume financial responsibility. At that time all of the property was losing money; it was not generating income sufficient to pay expenses and service the debt outstanding against it. He preferred to wait, to force Weiss, his responsible former partner, to continue operating the property and cover its losses pending an upturn in revenues. If such did not occur, he would simply do as he had done—nothing—and let Weiss foot the bill.

If Heilig really believed the arbitrator's award was faulty, and if he really intended to do something other than delay and snarl the confirmation hearings, he could have easily sought to change, modify, or correct the award pursuant to statute. NRS 38.115, 38.155.

He did nothing of the sort. Now that things have changed, after Weiss has rescued the property with his money, effort, and talent, Heilig wants this Court to give him, at Weiss's expense, the one-third of it he refused on February 22, 1973, by endorsing his deliberate and unlawful repudiation of the award he was instrumental in procuring. This is not the stuff out of which due process cases arise, and this Court should have no part of it.

The Petition for Certiorari should be denied.

Respectfully submitted,

STEVE MORRIS,
Attorney for Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

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Respondents.

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

The Respondents in their Brief in Opposition (No. 75-714) have intentionally misstated the facts in both their "Statement Of The Case" and their "Argument" sections. The most glaring misrepresentation is the allegation by Respondents that Petitioner never tendered a money offer to Respondents. As is discussed below in greater detail and in an affidavit of Jeffery Green, Esquire (with copy of tender offer check, Appendix A), there were indeed tender *offers* made.

However, for the sake of brevity and clarity, this Reply Memorandum will be broken down into those two sections of Respondents' Brief and will respond to those assertions presented by Respondents in the order asserted.

STATEMENT OF THE CASE

Respondents allege that because the lease was not recorded it was not a cloud on title, "a fact which was accepted by the district court". (Pg. 4, Opp. Br.) The district court neither made a finding nor "accepted" any finding on this point. There was an outstanding lease (Kogelschatz) that was capable of being recorded and thereby clouding title. Therefore, the partners (each of whom was a fiduciary) stipulated that before there would be any conveyance of property, or any final settlement of accounts, such lease had to be judicially cancelled. The Arbitrator was powerless to conclude until such cancellation occurred.

Petitioner excepts to the first two sentences relating to bankruptcy and the amount that was alleged lost on the property for the reason that there is nothing in the record to support such statements. (Pg. 5, Opp. Br.)[1] To the contrary, although under compulsion of a Subpoena Dueces Tecum, Respondent Weiss refused to

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[1] Although Respondents assert substantial losses of approximately $375,000.00, in the California case against the Kogelschatz Korp. (defaulting tenant), the Judge awarded only $38,474.00 in damages. It would appear that damages by Mr. Weiss were far less than alleged. (See Appendix B, letter from Thomas A.H. Hartwell, Esquire, to Myron F. Heilig, herein.)

produce partnership records during the hearing and Judge Christensen refused to compel same.

Respondents suggest that Petitioner refused to pay sums of money and Petitioner replies that amounts in addition to those alleged by Respondents were paid. (Pg. 5, 6, Opp. Br.) In this connection, Petitioner paid substantial amounts during the inception of the partnership and subsequent thereto.

Concerning the Judge O'Donnell Order, (Pg. 8, Opp. Br.), Respondents allege "(N)o one even suggested a stay of the closing." Such suggestion was totally unnecessary because of the scope of the O'Donnell Order (Petition For Certiorari, Appendix G, at 32a). That Order suspended the arbitrator's authority to "close" adversely to Heilig on February 22, 1973. Furthermore, all parties were before the court at that point and therefore the arbitrator had been divested of his authority. He could not legally proceed with the February 22nd hearing-"closing".

ARGUMENT

In response to Section I of the Argument commencing at page 10 of the Brief In Opposition, Petitioner Heilig asserts that the alleged hearing-"closing" was invalid for four reasons: First, no notice of hearing was ever served upon Heilig as required by the Rules of the American Arbitration Association. (App. H, Pet. for Cert., 33a) Secondly, the partnership had entered into a lease of the real property with the Kogelschatz Korp., a California corporation. One of the

terms of the partnership stipulation occuring during the course of the arbitration proceedings involved the parties' agreement that there would be no closing until such time as the Kogelschatz lease was judicially cancelled by the courts of Nevada, a condition which remains, to this date, unsatisfied. Thirdly, Petitioner Heilig did not attend the hearing-"closing" on advice of counsel. Fourthly, it was learned that Judge O'Donnell, in a hearing earlier the same day of the alleged hearing-"closing", refused to confirm the awards and ordered that Heilig be given until March 9, 1973 to file his objections to the awards. This judicial action terminated any arbitrator authority to penalize Heilig for his non-attendance at the February "closing". Nonetheless, Heilig was and continues to be penalized by the arbitrator's action.

In reply to Section II of the Argument at page 13, Petitioner would urge that the O'Donnell Order affected the closing for two reasons. First, commencing a week before the closing, Respondent Weiss brought himself before the jurisdiction of the district court to confirm the awards. Once before that Court, any possible jurisdiction was lifted from the arbitrator. Secondly, the Court, by granting Petitioner Heilig time in which to object to the award, committed itself to giving Heilig that time period. But the effect of what was done was to impose a million dollar forfeiture upon your Petitioner. The February 22nd hearing-"closing" was a legal nullity. Pertaining to the Respondents' second point, even if notice to Heilig's attorney is imputed to Heilig, which is not conceded, a mere technical objection such as this should not sustain the improper action by the Nevada Supreme Court in its refusal to

grant a Writ of Mandamus, which action sanctioned the judicial confiscation of Heilig's property by the written order of Judge Christensen. That order, which purported to confirm the award in fact, modified it and thereby deprived Heilig of that property awarded to him by the arbitrator.

On page 14 of the Petition in Opposition, Respondents state:

> "There was not a tender of any sum of money to the district court in connection with Heilig's attempt to amend the court's findings, nor was there a tender at any other time during the proceedings in either the district court or the Nevada Supreme Court".

To the contrary, there was a tender offer of $100,000.00 made on Petitioner Heilig's behalf. (Affidavit and Check Exhibit, of Jeffrey G. Green, Counsel for purchasers, Appendix A herein). That offer was made on March 18, 1974, at approximately 2:00 P.M. in the Chambers of Judge Christensen. The Green Affidavit recites the position then (and now) espoused by Weiss and his Counsel, Steve Morris of the firm of Lionel, Saywer, Collins and Wartman, to wit: that Heilig had been divested of all property and had nothing to sell. Later on that same date, in open court, Petitioner's counsel, Eric Zubel, tendered offers. See Transcript of Proceedings in the Eighth District Court of the State of Nevada in and for the County of Clark dated March 18, 1974 at 3:00 P.M. at pages 5 and 18, 19.

Concerning the variance between the district court's oral announcement and its written order, Petitioner has examined the supporting cases cited by Respondents and believes that they are easily distinguishable based upon the fact that Petitioner Heilig in reliance on the

bench order acted to his detriment. Further, the written order did not confirm the arbitrator's award as purported, but modified that award to divest Heilig of his properties–a power that the Judge was without. (N.R.S. 38.135)

In Section 4 at page 15, of their Brief, Respondents cite *Washoe Company v. Reno*, 77 Nev. 152 (1960) as support for the proposition that Mandamus "is not proper even if a possible legal remedy is not as plain, speedy and adequate a remedy as is provided by Mandamus . . ." *Washoe* involved the question of whether mandamus was an appropriate remedy to compel a Board of County Commissioners to apportion a general road fund as provided by statutory law. Apart from the facts which readily distinguish the two cases, in the *Washoe* case, the function of the trial court differed from the function of the trial court in this case. In *Washoe*, the court assumed the traditional judicial function. The role of the trial judge in this case was a ministerial function. A proceeding was commenced to merely confirm the arbitrator's award, yet the court's written order does not confirm the arbitrator's award, it alters it. The Court was not empowered to summarily make such alteration. Mandamus is appropriate to set aside an erroneous order where the making of the order is a ministerial function. See generally, *Mandamus*, 55 C.J.S., Section 89.

On Page 15, Respondents cite the cases of *Morgan v. Hines* and *Simmons v. Superior Court* as authority for the statement that merely because the Petitioner was unsuccessful in his attempt, does not mean that he has been denied due process. The first case, *Morgan v. Hines*, 113 F.2d 849 (D.C. Cir. 1940) is readily

distinguished upon the fact that Section 19 of the World War Veterans Act provided that the exclusive remedy with respect to such claims was reposed in the Federal District Courts. Because that remedy was exclusive, mandamus was not appropriate.

In the case of *Simmons v. Superior Court*, 341 P.2d 13 (1959; S. Ct. Cal.) the Court held that where an order of dismissal was entered into the minutes of the Court by the clerk pursuant to instructions given by the Judge in Chambers and although Petitioner was required to appeal within 60 days therefrom, Petitioner had failed to do so because the clerk had never sent him notice of the order. Certiorari was not available to Simmons. That case is readily distinguishable on the fact that the Defendants' demurrer to a second amended complaint was sustained, with leave granted to Simmons to amend. Thereafter, "Notice of Motion To Dismiss" was filed on the ground that Petitioner had failed to amend his Complaint within the time period allowed by the Court. After a hearing, Petitioner announced that he would like to stand on his Pleadings and opposed the Motion to Dismiss on the grounds that the demurrer had been improperly sustained. The Judge thereafter granted the Motion to Dismiss. The case at bar involves no amended complaint and no demurrer. More importantly, this case does not involve one single instance, unlike *Simmons*, where Heilig does not respond in timely fashion to an instruction from the Court relating to the date and deadline for filing Pleadings, a factor believed to be controlling to the *Simmons* court. Furthermore, the Nevada Supreme Court by its action in ordering the parties to file written briefs and prepare for oral argument suggested

that Mandamus indeed was an appropriate action. That suggestion is further confirmed by Rule 21(b) of the Nevada Rules of Appellate Procedure which provides:

> "If the Court is of the opinion that the Writ should not be granted, it may deny the Petition. Otherwise, it may enter an order fixing time within which an answer directed solely to the issues of arguable cause against issuance of an alternative or peremptory writ may be filed by the respondents . . . The Court shall by order advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument."

Indeed if the Supreme Court of the State of Nevada was of the opinion that the Writ of Mandamus was not an appropriate action, it should have denied same *instanter* or alternatively, when denying Mandamus, grant unto the Petitioner a reasonable time in which to pursue his appeal. By doing neither, Petitioner was judicially denied an opportunity to appeal.

On Page 16, respondents state that Heilig need only have filed a "simple, one-page Notice of Appeal within the next thirty days" (after the District Court entered its Order confirming the award of January 28, 1974 while a stay was in effect). They cite *Jumbo Mining Co. v. District Court*, 28 Nev. 253 (1905), as authority for this proposition. It is inapposite. That case involved questions of whether the lower court should have dissolved an injunction and discharged an appointed receiver based upon lack of jurisdiction and secondly an issue regarding the fees to be paid to the receiver by an innocent party. The case does not discuss initial steps in appellate procedure. Petitioner, to the contrary, strongly urges the following: (1) The District Court illegally entered its Order confirming the award because

the Supreme Court of Nevada had issued a Stay; (2) Commencing with Rule 3, *et seq.* of the Nevada Rules of Appellate Procedure, appellate procedure is set forth and *far more steps* would have to be taken than a simple notice. Indeed, one of the reasons why Petitioner sought review by Mandamus was because he was in no financial position to post a supersedeas bond which would have been required-a financial position, incidentally, brought about exclusively by Heilig's unfortunate association with his partners, the parties who have profited from this litigation. The Nevada Supreme Court recognized Heilig's dilemma, when it twice refused to grant respondents' motions to require such a bond.

The importance and substantiality of the questions presented have not been refuted; rather, the brief in opposition highlights the gross injustices which have been inflicted upon Petitioner. Because Heilig did not attend an illegal hearing-"closing", the Court has divested him of two-thirds of the property in which he had an interest. With respect to the remaining one-third, which was awarded to Heilig, the title is clouded and the property encumbered. Outstanding judgments have been assessed against Petitioner Heilig without the right to question those judgments. Those judgments lack the basic *quid pro quo* providing for the conveyance to Heilig of his property in the event the judgments are met which was provided for by the arbitrator. Heilig attempted to satisfy those judgments, but the respondents rejected his efforts.

In conclusion, Petitioner respectfully submits that the Supreme Court is virtually mandated to hear this case because of Supreme Court Rule 19(1)(b) which provides:

> "as a basis for issuing certiorari, [W]here a court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

The actions taken by the Nevada Courts have so departed from the constitutional norms, as is set forth commencing at page 18 *et seq.* of the Petition for Certiorari, that flagrant violations of due process have been inflicted upon your petitioner.

WHEREFORE, Petitioner prays that the Petition for Writ of Certiorari be granted for reasons stated in the Petition and in this reply brief.

Respectfully submitted,

WILLIAM C. CRAMER
BENTON L. BECKER
ARTHUR R. AMDUR
Cramer, Haber and Becker
475 L'Enfant Plaza, S.W.
Suite 4100
Washington, D.C. 20024
(202) 554-1100

Date: January 9, 1976

APPENDIX A

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

No. 75-714

MYRON F. HEILIG,

Petitioner,

vs.

HONORABLE CARL J. CHRISTENSEN, Chief Judge, Eighth Judicial District Court of the State of Nevada, in and for the County of Clark; ROBERT WEISS; and JACK SHULMAN,

Respondents.

AFFIDAVIT OF JEFFREY G. GREEN, ESQ.

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

JEFFREY G. GREEN, Esq., being first duly sworn, deposes and says:

1. That he is an attorney of law duly licensed to practice law in the State of Nevada maintaining offices at 316 East Bridger Avenue, Las Vegas, Nevada. That

on or about March 18, 1974, your Affiant was employed by the law firm of JONES, JONES, BELL, LeBARON, CLOSE, BILBRAY AND KAUFMAN, 302 East Carson Avenue, Suite 620, Las Vegas, Nevada, and was associated with CLIFFORD A. JONES, Esq., as an attorney for ROBERT LEE, LTD., a Canadian corporation. That your Affiant became involved with the representation of that corporation in connection with the contemplated acquisition by the corporation of certain land in Las Vegas, Nevada, awarded to MYRON F. HEILIG in earlier arbitration proceedings relative to an attempted dissolution of a partnership involving HEILIG, WEISS and SHULMAN.

2. On or about March 18, 1974, your Affiant became aware of the fact that there existed certain difficulties relative to the condition of the title of the above property. Your Affiant became further aware that there was, at that time, certain pending litigation in the Eighth Judicial District Court for the State of Nevada, Case No. A 96771, which involved post-arbitration proceedings concerning the subject property. In the process of investigating the circumstances of this litigation, your Affiant determined that there existed outstanding judgments on behalf of ROBERT WEISS and JACK SHULMAN, against MYRON F. HEILIG, in the approximate sum of $100,000.00, satisfaction of which your Affiant understood to be a precondition to the acquiring of MYRON F. HEILIG'S clear title to the subject property.

3. On March 18, 1974, at approximately 2:00 p.m., your Affiant met in the chambers of the Honorable CARL J. CHRISTENSEN, District Judge, in connection with further proceedings in WEISS v. HEILIG, et al. Also present at that meeting were STEVE MORRIS,

Esq., attorney for ROBERT WEISS, ERIC ZUBEL, Esq., attorney for MYRON F. HEILIG, and CLIFFORD A. JONES, Esq., who, along with your Affiant, represented the interest of ROBERT LEE, LTD. in the capacity of *amicus curiae*. The purpose of that meeting was to attempt to resolve the issue of HEILIG'S title to the subject property prior to oral argument on HEILIG'S Motion for Rehearing on the Motion to Confirm the Arbitrator's Award previously granted by Judge CHRISTENSEN. At that meeting, your Affiant was present when CLIFFORD A. JONES, Esq. represented to Judge CHRISTENSEN that JONES, JONES, BELL, LeBARON, CLOSE, BILBRAY AND KAUFMAN would, on behalf of ROBERT LEE, LTD., pay to HEILIG the sum of $100,000.00, as and for a down payment on the property if HEILIG could present Affiant's client with clear title to said property; that a copy of the check for $100,000.00 is attached hereto, marked Exhibit "A" and, by this reference, made a part hereof. At that meeting, your Affiant also heard STEVE MORRIS, Esq. make representations to Judge CHRISTENSEN to the effect that HEILIG had no remaining interest in the partnership property which could be the subject of the sale to ROBERT LEE, LTD. and, therefore, HEILIG should not be permitted to encumber property belonging to WEISS.

/s/ Jeffrey G. Green
JEFFREY G. GREEN, Esq.

SUBSCRIBED AND SWORN to before me
this 31st day of December, 1975.

/s/ Kathryn A. Kessler
NOTARY PUBLIC

NOTARY PUBLIC – STATE OF NEVADA
CLARK COUNTY
Kathryn A. Kessler
My Commission Expires Feb. 16, 1979

THE ROYAL BANK OF CANADA

No. 948

MAIN & HASTINGS BRANCH
400 MAIN STREET
VANCOUVER, B.C.

March 13 19 74

PAY TO THE ORDER OF JONES, JONES, BELL, LeBARON, CLOSE, BILBRAY & KAUFMAN U.S. $ 100,000.00

----------ONE HUNDRED THOUSAND----------00/100 DOLLARS

Re Fairway Gdns
Las Vegas

ROBERT LEE LTD.

⑆07120⑈003⑆ 136⑈656⑈6⑈

5a

EXHIBIT A

APPENDIX B

COOLEY, GODWARD, CASTRO, HUDDLESON & TATUM

LAW OFFICES

April 23, 1975

Myron F. Heilig
Apartment 13I
95 Christopher Street
New York, NY 10014

Re: Weiss v. Kogelschatz

Dear Mr. Heilig:

I am in receipt of your letter of April 14, 1975.

The judge has now indicated that he will give a judgment in favor of plaintiff in the sum of $38,474.00. The judge has not as yet filed a final judgment.

I am disappointed in the size of the award. It remains to be seen whether there will be any appeal on behalf of plaintiff. There are serious questions as to any collectibility of any judgment. Defendants' attorney has consistently advised this office that his client has no money whatsoever.

I note your statement that you "wish to receive directly my share (1/3) of all sums paid over by way of settlement." The extent to which any sums should be paid "directly" to you, it seems to me, would have to be a matter between you and Mr. Weiss. This office is not going to get involved in any dispute between you and Mr. Weiss, as it is not prepared to represent either one of you against the other.

Yours very truly,

Thomas A. H. Hertwell

TAAH/mf
cc: Robert C. Weiss

FILED

FEB 6 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-714

MYRON F. HEILIG,

Petitioner,

v.

HONORABLE CARL J. CHRISTENSEN, Chief Judge, Eighth Judicial District Court of the State of Nevada, In and for the County of Clark; ROBERT WEISS; and JACK SHULMAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

PETITION FOR REHEARING

WILLIAM C. CRAMER
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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEVADA

PETITION FOR REHEARING

The Petitioner herein respectfully moves this Court for an order (1) vacating its denial of the Petition for Writ of Certiorari, entered on January 12, 1976, and (2) granting the Petition. As grounds for this Motion, Petitioner stated the following:

(1) The Reply Brief, which contains new and crucial information may not have been considered by this court prior to its determination. On Friday, January 9, 1976, Petitioner filed a Reply Brief, which, in addition to rebutting and clarifying contentions asserted in the Petition in opposition, contained a crucial affidavit from one Jeffery Green, Esquire. This affidavit clearly established error and an obvious lack of concern for accuracy on the part of the Respondents, all of which have resulted in the wrongful taking of Petitioner's property without due process of law. Since it is not known whether this court received the Reply Brief timely and reviewed it prior to its determination to deny certiorari, or whether the brief was distributed untimely so that the court did not have the benefit of the Reply Brief and the Green affidavit therein, this Petition for Rehearing is being submitted. Certiorari was denied the following Monday morning on January 12, 1976. To the extent that the Reply Brief may not have been duly considered by this Court, Petitioner Heilig urges that there have been both intervening circumstances of substantial or controlling effect, and substantial grounds available to Petitioner, pursuant to Rule 58, all of which necessitate this Court to consider the Reply Brief and to review the Petition for Certiorari in light of the contents of that Reply Brief.

(2) *Affidavit of Jeffery G. Green, Esquire.*

On Page 14 of the Petition In Opposition, Respondents inaccurately state:

> "There was not a tender of any sum of money to the district court in connection with Heilig's attempt to amend the court's findings, nor was

there a tender at any other time during the proceedings in either the district court or the Nevada Supreme Court."

To the contrary there were tender offers made as reflected in the Reply Brief and in particular in the affidavit of Jeffery G. Green, which provides in pertinent part:

3. On March 18, 1974, at approximately 2:00 p.m., your Affiant met in the chambers of the Honorable CARL J. CHRISTENSEN, District Judge, in connection with further proceedings in WEISS v. HEILIG, et al. Also present at that meeting were STEVE MORRIS, Esq., attorney for ROBERT WEISS, ERIC ZUBEL, Esq., attorney for MYRON F. HEILIG, and CLIFFORD A. JONES, Esq., who, along with your Affiant, represented the interest of ROBERT LEE, LTD. in the capacity of *amicus curiae*. The purpose of that meeting was to attempt to resolve the issue of HEILIG'S title to the subject property prior to oral argument on HEILIG'S Motion for Rehearing on the Motion to Confirm the Arbitrator's Award previously granted by Judge CHRISTENSEN. At that meeting, your Affiant was present when CLIFFORD A. JONES, Esq. represented to Judge CHRISTENSEN that JONES, JONES, BELL, LeBARON, CLOSE, BILBRAY AND KAUFMAN would, on behalf of ROBERT LEE, LTD., pay to HEILIG the sum of $100,000.00, as and for a down payment on the property if HEILIG could present Affiant's client with clear title to said property; that a copy of the check for $100,000.00 is attached hereto, marked Exhibit "A" and, by this reference, made a part hereof. At that meeting, your Affiant also heard STEVE MORRIS, Esq. make representations to Judge

CHRISTENSEN to the effect that HEILIG had no remaining interest in the partnership property which could be the subject of the sale to ROBERT LEE, LTD. and, therefore, HEILIG should not be permitted to encumber property belonging to WEISS.

The refusal of the court and the other respondents to accept the tender offer was violative of the arbitration agreement which the trial court was merely confirming, and deprived Petitioner of his property without due process of law. The seeking of a writ of mandamus by Petitioner was appropriate and the only effective remedy to correct the injustices inflicted upon Petitioner. The denial of mandamus to require the trial judge to conform his order to the arbitration award and to accept the tender offer by the Nevada Supreme Court wrongfully propagated the injustices.

For the reasons set forth above as well as those contained in the Petition for Certiorari and the Reply Brief, Petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

WILLIAM C. CRAMER
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Suite 4100
Washington, D.C. 20024
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Attorneys for Petitioner

February 6, 1975